

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

WILBUR K. MILLER

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9/23/63

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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,904

858

ROBERT SHELTON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 19 1963

Nathan J. Paulson
CLERK

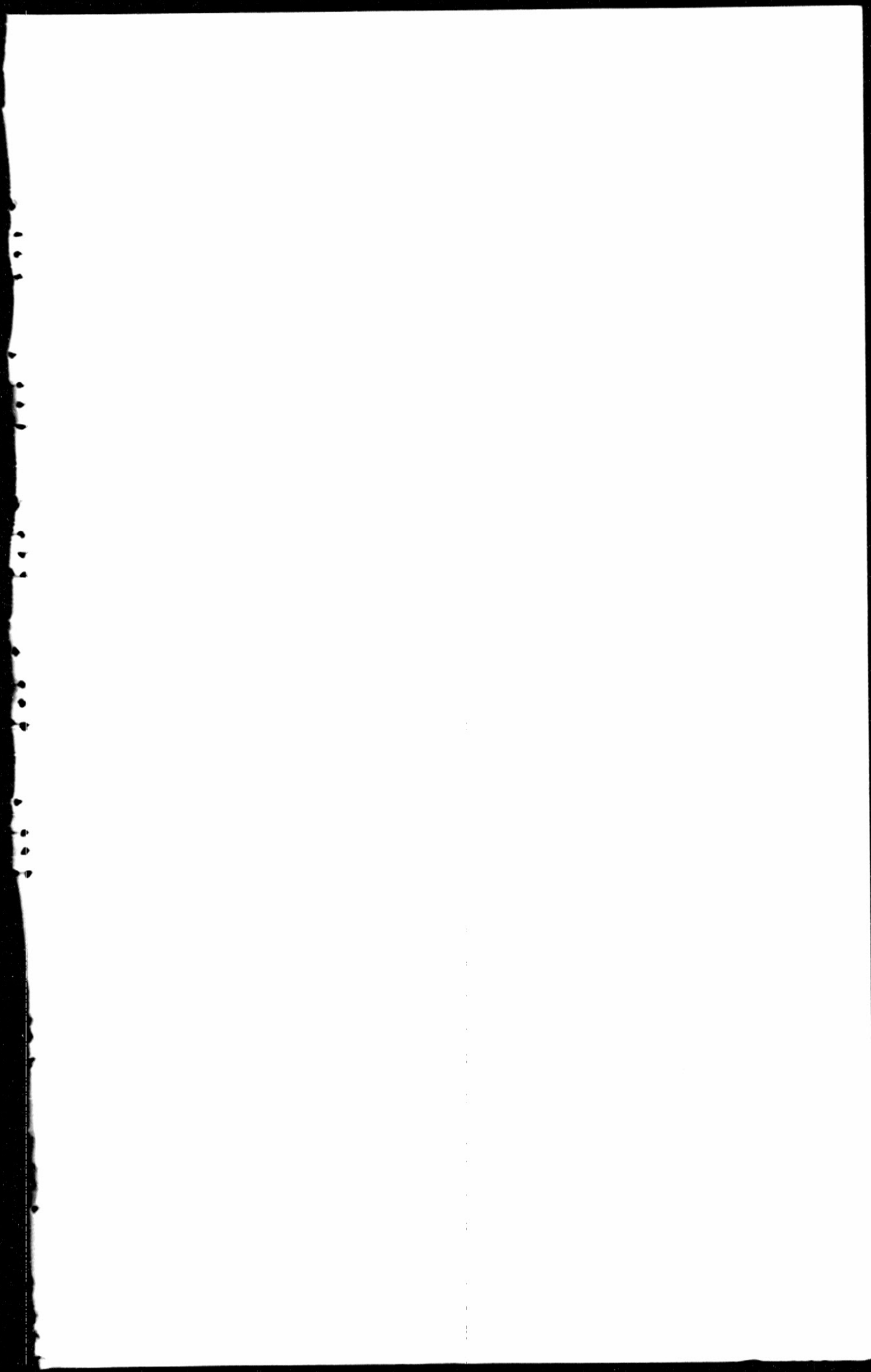
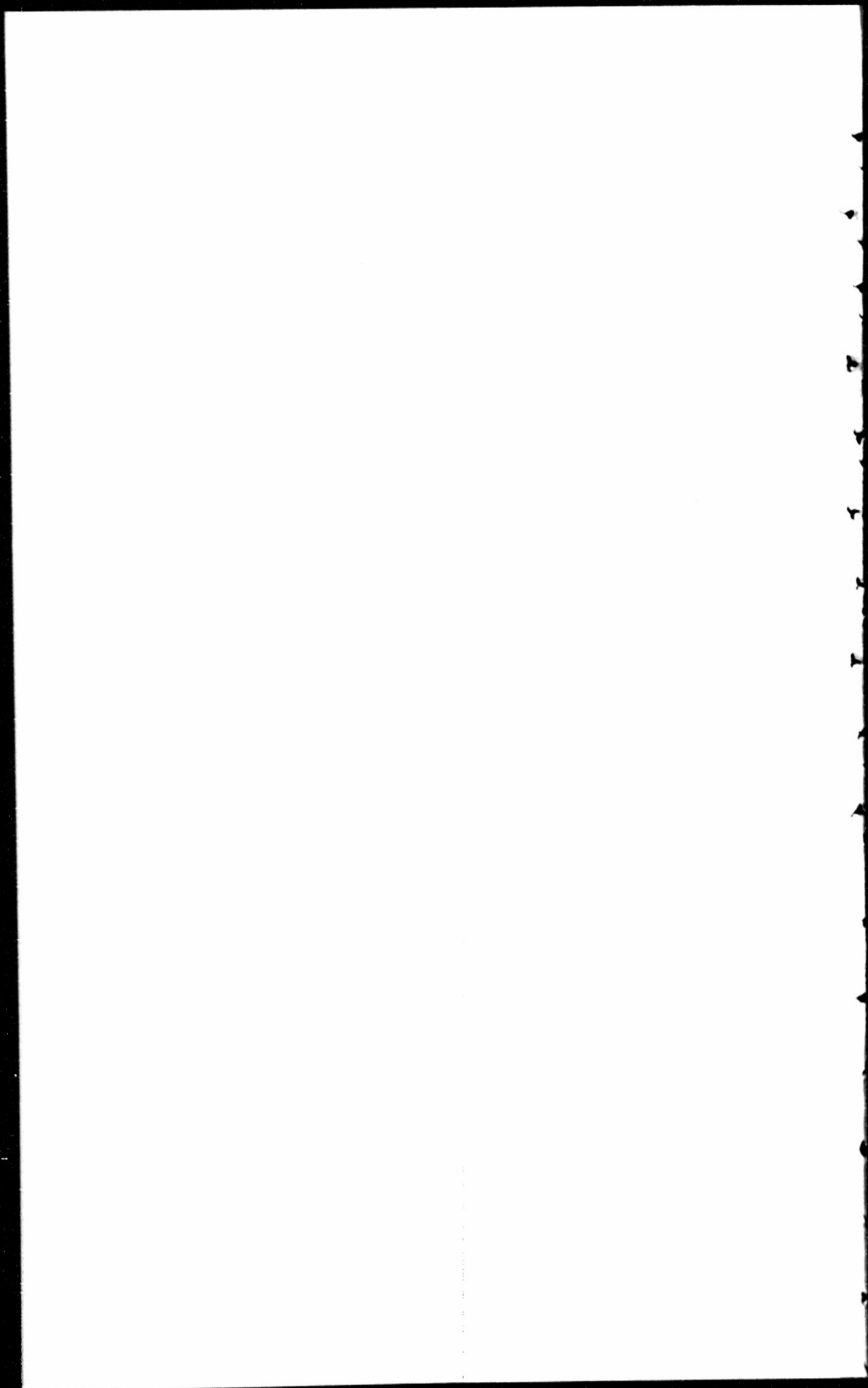


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Filed in open court. October 1, 1962. Harry M. Hull, Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on September 4, 1962

UNITED STATES OF AMERICA,

v.

ROBERT SHELTON

Criminal No. 825-62

Grand Jury Original 2 U.S.C. 192

The Grand Jury charges:

INTRODUCTION

The Committee on the Judiciary of the United States Senate, by its resolution of January 20, 1955, authorized its Special Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws under S. Res. 366, 81st Congress, (also known as the Senate Internal Security Subcommittee) to continue as a Special Subcommittee during the 84th Congress. On February 7, 1955, the Chairman of the Committee appointed certain of its members to comprise the aforesaid Subcommittee.

On January 6, 1956, in the District of Columbia, the said Subcommittee was conducting hearings, pursuant to the appointment and authorizations set forth above and to S. Res. 58, 84th Congress, and to the Standing Rules of the Senate, on the subject of Communist activities in news media, which was a subject and question of inquiry within the scope of the authority of the Subcommittee.

Defendant Robert Shelton appeared as a witness before that Subcommittee at the time and place above stated and

was asked certain questions pertinent to the above subject and question under inquiry, which pertinent questions he deliberately and intentionally refused to answer.

The allegations of this Introduction are adopted and incorporated into the Counts of this Indictment which follow, each of which Counts will in addition merely set forth the particular pertinent question which was asked of the defendant and which he so refused to answer.

COUNT ONE

Are you, sir, a member of the Communist Party U.S.A.?

COUNT TWO

Did you ever have any conversation with Matilda Landsman?

DAVID C. ACHESON,
*United States Attorney in and
for the District of Columbia.*

A TRUE BILL:

_____,
Foreman.

Filed October 5, 1962. Harry M. Hull, Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*,

v.

ROBERT SHELTON, *Defendant*.

Cr. No. 825-62

MOTION TO DISMISS INDICTMENT

Comes now the defendant and moves that the Court dismiss the indictment filed against him in this case on October 1, 1962, on the following grounds:

1. The offense charged against defendant in the indictment is alleged to have been committed in January of 1956. An earlier indictment for the same offense was filed against defendant on November 26, 1956. Trial of the defendant now upon the new indictment would deny him his constitutional right to a speedy trial under the Sixth Amendment to the United States Constitution.
2. The indictment against defendant is insufficient to meet the requirements of the Sixth Amendment and of 2 U.S.C. 192, in that it fails to specify any resolution or action of the United States Senate or of the Senate Committee on the Judiciary, which authorized the Internal Security Subcommittee to conduct the investigation alleged in the indictment, or indeed any investigation whatever.
3. At the time of the submission of the matter of defendant's alleged contempt to the grand jury which voted this indictment, and at the time that the grand jury voted its indictment, there was not in existence nor had there been certified to the United States Attorney, a contempt citation certified under the seal of a then

existing Senate of the United States by a then incumbent President thereof. In the absence of such certification, required by 2 U.S.C. 194, there was no statutory authority for bringing the matter before the grand jury for its action and thus for the present indictment.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
Attorneys for Defendant,
1625 K Street, N.W.,
Washington 6, D. C.

MELVIN L. WULF.
156 Fifth Avenue,
New York 10, New York.

POINTS AND AUTHORITIES

The Constitution of the United States, Sixth Amendment.
2 U.S.C. 192.
2 U.S.C. 194.

CERTIFICATE OF SERVICE

I certify that I have this 5th day of October, 1962, served a copy of the foregoing Motion upon the United States Attorney by leaving a copy thereof at his office in the United States Court House.

JOHN SILARD.

Filed December 19, 1962. Harry M. Hull, Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 825-62

UNITED STATES OF AMERICA,

v.

ROBERT SHELTON

ORDER

The defendant's motion to dismiss the indictment came on to be heard by the Court on November 9, 1962, at which time oral argument was heard and the motion was taken under advisement. After consideration of the defendant's written memoranda in support of his motion, and of the Government's memoranda in opposition thereto, the Court has concluded, for the reasons set forth in a memorandum filed by the Court today, that:

1. The first ground advanced by the defendant in support of said motion should be rejected, with leave hereby granted to the defendant to renew said ground for said motion at the time of trial if prejudice resulting from the absence of witnesses because of delay in the trial should appear on the record adduced at said trial.

2. The second ground advanced by the defendant in support of said motion should be deferred for determination at the trial.

3. The third ground advanced by the defendant in support of said motion should be in part rejected, and in part deferred for determination at the trial, if said ground is there specifically advanced by the defendant.

Therefore, it is by the Court this 19th day of December, 1962,

ORDERED That the defendant's motion be in part denied, and in part deferred for determination at the trial.

LUTHER W. YOUNGDAHL,

Judge.

Filed December 19, 1962. Harry M. Hull, Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Criminal Case No. 825-62

UNITED STATES OF AMERICA,

v.

ROBERT SHELTON

MEMORANDUM

On May 21, 1962 the defendant's conviction of contempt of Congress, 2 U.S.C. §192, was reversed by the Supreme Court, 369 U.S. 749 (1962), *sub nom. Russell v. United States*, on the ground that his original indictment in May, 1956, was fatally defective because it failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated. The Court held that an indictment for contempt of Congress must contain such an averment. 369 U.S. at 754-5. On October 1, 1962, the defendant was reindicted for the same offense. This time the indictment identified the subject under inquiry as "Communist activities in news media."

The defendant has moved under Rule 12(b)(2), Fed. R. Crim. P. to dismiss this new indictment on three grounds:

1. Proceedings under the new indictment would deny defendant's constitutional right to a speedy trial.
2. The indictment fails to show the subcommittee's specific authority to investigate the alleged subject under inquiry.
3. The United States Attorney had not received a contempt citation certified under the seal of a then-existing Senate by a then-incumbent president thereof at the time the defendant's alleged contempt was presented to the grand jury during September, 1962.

Each of these grounds for dismissal will be examined separately.

I. *Speedy trial*

The defendant contends that his constitutional right to a speedy trial would be violated if he were to be tried under this new indictment, because "the six years which have elapsed since defendant's first indictment (and the almost seven years since the alleged commission of the offense) are in the particular circumstances here presented too long a delay to permit defendant's trial at this time." The "particular circumstances" on which the defendant relies to support his contention are, first, that the Government "consciously and erroneously" chose the form of the first indictment, and second, that witnesses who were unnecessary under the wording of the first indictment but who are allegedly indispensable under the wording of the second indictment are now unable to testify in court.

The Sixth Amendment to the Constitution provides that in all criminal prosecutions, "the accused shall enjoy the right to a speedy and public trial" The Supreme Court has construed these words to permit some delays, and to forbid others. "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Beavers v. Haubert*, 198 U.S. 77, 87 (1905). "Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances. [Citations omitted.] The delay must not be *purposeful or oppressive*." *Pollard v. United States*, 352 U.S. 354, 361 (1957). (Emphasis added.)

Cases in this circuit both before and after *Pollard, supra*, amplify the standards to be used by courts in deciding whether a particular delay is, in the Supreme Court's words, "purposeful or oppressive." "The essential inquiries are whether there was *unnecessary delay* in bringing about the new trial and whether the accused could now have a *fair trial*." *United States v. Gunther*, 104 U.S. App. D.C. 16, 17 (1958). (Emphasis added.) Where there has been a "substantial" or "extraordinary delay," the Government, to sustain its right to try the accused "must show . . . that the accused suffered *no serious prejudice* beyond that which ensued from the ordinary and inevitable

delay [attributable to the processes of justice].” *Williams v. United States*, 102 U.S. App. D.C. 51, 53-4 (1957). (Emphasis added.) One judge in *Williams, supra*, would have gone further to hold that where there is “more delay than is reasonably attributable to the ordinary processes of justice,” that fact alone should prevent trial, regardless of whether the defendant was prejudiced by the delay. 102 U.S. App. D.C. at 53-4. A “long lapse of time” which “seriously . . . handicapped the preparation of a defense” entitles the defendant to have an indictment dismissed, *Taylor v. United States*, 99 U.S. App. D.C. 183, 186 (1956). Accord, *United States v. McWilliams*, 82 U.S. App. D.C. 259 (1947). But if the delay was caused by an error made by the defendant himself which required time “to extricate himself” from that error, then the defendant cannot complain about the delay. *Dandridge v. United States*, 105 U.S. App. D.C. 157, 158 (1959).

These cases establish that the lapse of time alone is not sufficient to deprive a defendant of his constitutional right to a speedy trial. There must be, in addition, either unnecessary delay caused by the Government or the courts, or prejudice to the defendant, or both. In this case, there is neither. The delay of six years is wholly attributable to the ordinary and necessary processes of justice; and there is no prejudice to the defendant. Thus in this case the delay is neither “purposeful” nor “oppressive.” *Pollard, supra*, at 361.

The delay between the first indictment and the forthcoming trial of this case under an indictment which meets constitutional requirements of specificity is wholly attributable to the ordinary and necessary processes of justice. The defendant makes no contention that there was any unnecessary delay between the alleged offense, January 6, 1956, and the first indictment, May 26, 1956. Nor does the defendant assert that there was any unnecessary delay between that indictment and his trial, conviction, and sentence in January, 1957. Nor does the defendant claim that any of the appellate procedures—several of them postponed at the specific request of the defendant—took an undue amount of time, since it is abundantly clear that

the period from January, 1957, to the Supreme Court's opinion in May, 1962, was wholly consumed by the time required for thorough appellate review. It was the defendant who sought such appellate review, both by the Court of Appeals and—when that court held in the Government's favor—by the Supreme Court. The defendant does not complain—as indeed he could not—of the time required for such review. And finally, the defendant does not claim that there was any delay between the Supreme Court's decision in May, 1962, and his reindictment on October 1, 1962. Thus the defendant concedes that as far as the judicial process is concerned, the time which elapsed between the first and second indictments was wholly attributable to the ordinary and necessary processes of justice.

The defendant's whole argument rests upon the assertion that the Government's choice of wording in that first indictment is the cause of all the later delay, and that this delay was unnecessary because the initial choice was unnecessary. In other words, the defendant argues that because the Government could have originally specified in the indictment the subject under inquiry by the Congressional committee, the Government's failure so to do makes all the time between that indictment and the new indictment "chargeable" to the Government.

This Court does not consider the Government's choice of wording in the first indictment either willful or negligent or "purposeful," and it is open to serious question whether the Government made a "choice" at all. Under the law as it then clearly existed in the District of Columbia, the wording of the indictment was completely proper; such wording was not declared improper until the Supreme Court decided this very case, *sub nom. Russell, supra*. That the wording of the first indictment reflected the then-current rule in the District of Columbia was emphasized by the Supreme Court itself when that Court changed the rule, both in the majority opinion, 369 U.S. at 754, n. 7, and in the dissent, 369 U.S. at 782, n. 2. Moreover, if this then-current rule did permit the Government any choice in the matter, it would have been proper for the Government to resolve the choice in favor of simplicity—i.e., in favor of

omitting an allegation of the specific subject under inquiry—under the simplified rules of criminal procedure.¹ Thus this Court finds no fault on the part of the Government in its choice of wording in the first indictment.

In reaching this conclusion, this Court is not unmindful of the defendant's argument that the Government need not be found to have exercised its choice in bad faith in order for the speedy trial argument to have validity. Nor is the Court unmindful of *Petition of Provoo*, 17 F.R.D. 183 (1955), *aff'd per curiam*, 350 U.S. 857 (1955), where the trial court did not require a showing of bad faith and found merely that the Government had made "a deliberate choice for a supposed advantage, which caused as much oppressive delay and damage to the defendant as it would have caused if it had been made in bad faith." 17 F.R.D. at 202. What that court meant by "a deliberate choice," however, shows the complete irrelevance of that case to the one now under consideration. In *Provoo* the Government made an erroneous choice of venue which was unsupported in prior case law and which was exercised in order to have the trial in a supposedly more favorable (to the Government) jurisdiction. Thus the court in *Provoo* stated that the Government "must have known that venue in [the place initially chosen] was at least doubtful, in view of [an earlier decision of the Supreme Court]," 17 F.R.D. at 195, and held that "where the government chooses to proceed in a certain district in a doubtful case of venue, when venue in another district is clear, the government must be held responsible for the effects of its election." 17 F.R.D. at 201-2. Moreover, the court in *Provoo* made findings of fact which included the following quotation from a lengthy conversation between two Government officials regarding the question of venue: "We do not want that [possible venue] because it is an undesirable place for us to proceed in cases [involving this offense]. We do not get cooperation from

¹ "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement." Rule 7(c), Fed. R. Crim. P.

the U.S. Attorney or the District Judge." 17 F.R.D. at 190. Thus in *Provo* there was indeed a "deliberate choice" exercised, as the court said, "for a supposed advantage." That deliberate choice amounted to chicanery, if not to outright bad faith. Here, by contrast, there is not the slightest hint of bad faith, chicanery, negligence, or any other degree of fault on the part of the Government. It is not even clear that a "choice" was made at all. The Government simply followed the law as it then existed. The change in that law is to the advantage of the defendant. Thus the defendant's argument based upon *Provo* is unpersuasive as applied to this case, and this Court is firmly convinced that there was no delay which could have been reasonably avoided by the Government. Thus this Court concludes that the delay was not "purposeful."

Nor does this Court find that a trial at the present time would be "oppressive." The prejudice asserted by the defendant is that the late Senator Hennings, a member of the subcommittee before which this defendant appeared, could have been called to give oral testimony on the issue of whether—as the Government has now alleged—the subject under inquiry by the subcommittee was "Communist activities in news media," and that Senator Hennings' absence because of death is attributable to the period of delay, since he was alive at the time of the first trial.

It is this Court's opinion, however, that the effect upon the defendant of Senator Hennings' absence can be completely neutralized by a ruling which would bar all oral testimony by all witnesses on the question of the subcommittee's "subject under inquiry." The Government has conceded that under the Supreme Court's ruling in this case, the burden is upon the Government to prove the alleged subject under inquiry as one of the essential elements of the Government's case, but the Government has also stipulated to the Court that it does not intend to offer oral testimony on this issue.² Since the Government's

² The defendant concedes that oral testimony would be inappropriate to determine whether the alleged subject under inquiry was made known to the defendant at the time of his appearance before the subcommittee,

burden on this essential element, as upon all others, is *proof beyond a reasonable doubt*, it is hard for this Court to see how the defendant can fail to be helped by a ruling which would require that this issue be proved from printed documents—mainly the transcript of subcommittee proceedings—alone. On the one hand, if the written records are unambiguous, then familiar principles of law would forbid the Court to permit oral testimony to contradict those records. On the other hand, if the written records are ambiguous, any ambiguities would have to be resolved in favor of the defendant since an ambiguity on this issue might well create a reasonable doubt concerning the subject under inquiry.³ Thus it appears to me that the unavailability of Senator Hennings because of death would in no way prejudice the defendant's case.

Of course, at this juncture this Court cannot rule finally on the admissibility of evidence at a trial which has not even begun. Should it appear to the trial court that Senator Hennings' testimony would be competent and material, and should it further appear that the absence of such testimony would seriously prejudice the defendant, then the defendant could at that time renew his motion to dismiss on the ground that his constitutional right to a speedy trial was then being violated. This Court is not suggesting how it would decide that issue if it were to arise. The

as *Watkins v. United States*, 354 U.S. 178 (1957), requires. Only the written transcript of the subcommittee hearings would be relevant to determine that issue. It is my opinion that such written transcript is similarly the most appropriate evidence to determine whether the alleged subject under inquiry was, in truth, the subject which the subcommittee was investigating.

³ Compare Douglas, J., concurring in *Russell*, *supra*: "The investigation was concededly an investigation of the press. This was clearly brought out by the record in *Shelton* . . ." 369 U.S. at 773; with Assistant United States Attorney Hitz "As to the second asking [of the bill of particulars], the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted. This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose . . ." Supreme Court Record from U.S. District Court for the District of Columbia, 20.

Court is merely deciding that a finding of prejudice at this time would be premature, because there is no prejudice shown in the facts before it.

Therefore, because the Government was not at fault in its choice of wording on the first indictment, and because the defendant is not prejudiced by the lapse of time between trial under the first indictment and trial under the second indictment, the defendant's contention that trial now would violate his constitutional right to a speedy trial will be rejected. The Court, however, grants the defendant leave to renew said ground for said motion at the time of trial if prejudice resulting from the absence of witnesses because of delay in trial should appear on the record adduced at said trial.

II. *Subcommittee authority*

As a second ground for his motion to dismiss the indictment, the defendant contends that the indictment fails to specify any resolution or action of the United States Senate or of the Senate Committee on the Judiciary which authorized the Internal Security Subcommittee to conduct the investigation alleged in the indictment.

Since the indictment does specify certain Senate Resolutions, as alleged grounds for the investigation of "Communist activities in news media," the question whether these specified resolutions do in fact authorize the alleged subcommittee investigation would be more appropriately answered at the trial, where there will be opportunity for full consideration of the resolutions and the subcommittee's authority. Thus this Court concludes that this issue cannot be determined from the indictment alone, and therefore defers the issue for determination at the trial. Rule 12 (b)(4), Fed. R. Crim. P.

III. *Contemporaneous Senate seal*

As a third ground for his motion to dismiss the indictment, the defendant contends that the United States Attorney had not received a contempt citation certified under the seal of a then-existing Senate by a then-incumbent presi-

dent thereof at the time the defendant's alleged contempt was presented to the grand jury in 1962. In other words, while the defendant does not deny that such seal was present when the first indictment was returned in 1956, thus complying with 2 U.S.C. §194, the defendant contends that a new seal, signifying a renewed certification of the fact that the witness refused to answer certain questions, must have been received before the case could have been presented to the grand jury again. The defendant argues that 2 U.S.C. §194 "should be construed to authorize the commencement of a criminal proceeding by the exercise of the United States Attorney's duty to bring a contempt citation before the grand jury, *only* if he does so during the tenure of the Congress whose contempt citation is certified by an incumbent speaker of the House or President of the Senate."

This Court does not believe that 2 U.S.C. §194 should be construed in the manner suggested by the defendant. 2 U.S.C. §194 requires the President of the Senate or the Speaker of the House to certify to the United States Attorney a "statement of fact" under the seal of the Senate or House. The facts to be certified in this way are that the witness was summoned as provided in 2 U.S.C. §192; that the witness failed to comply in one of the specified ways; and that these facts have been reported to either House of Congress. These facts, once certified, remain facts. As such, they are sufficient to permit the United States Attorney to present the matter to a grand jury, regardless of a lapse of time necessitated by trial under an erroneously worded indictment and the reversal of conviction on appeal. 2 U.S.C. §194 must be read in conjunction with 18 U.S.C. §3288, which permits reindictment at the term of court next succeeding the dismissal of an indictment found defective or insufficient for any cause. Since the facts of the alleged offense had previously been conveyed to the United States Attorney through the method prescribed in 2 U.S.C. §194, there was no need for a second certification of these facts in order to permit reindictment within the time allowed in 18 U.S.C. §3288.

It is possible that the defendant means to state a different contention—that is, that since the certified “statement of fact” made by the presiding officer of the Senate or House must state that the witness refused to answer a “question pertinent to the subject under inquiry,” 2 U.S.C. §194, and since the first indictment was dismissed by the Supreme Court on the ground that the statement therein of the “subject under inquiry” was insufficient, the new Senate certification is required in order to inform the United States Attorney of a different “subject under inquiry” as the basis for a new indictment. This argument, in other words, assumes that the Congress itself must specify the particular “subject under inquiry” which would thereby become the “subject under inquiry” alleged in the indictment.

This Court has not heard argument on this point, nor has it received any evidence on the point. The contempt citation actually in the hands of the United States Attorney has not been introduced into evidence, and therefore what it does or does not specify is not in the record before this Court. Moreover, whether the Supreme Court would extend *Watkins, supra*, and *Russell, supra*, to require the Congress itself to specify the “subject under inquiry” is in no way even remotely suggested in those opinions. Indeed, the only Supreme Court language on the subject holds directly to the contrary:

When the facts are reported to the particular House, the question or questions may undoubtedly be withdrawn or modified, or the presiding officer directed not to certify; but if such a contingency occurs, or if no report is made or certificate issued, *that would be matter of defence, and the facts of report and certificate need not be set out in an indictment under the statute. In re Chapman*, 166 U.S. 661, 667 (1897). (Emphasis added.)

Thus the Government does not have to allege or prove compliance with 2 U.S.C. §194, and if non-compliance is relevant at all, that argument would more properly be

heard at the trial as a matter of defense. *But see Ex parte Frankfeld*, 32 F. Supp. 915 (D.C. 1940). The Court is not indicating that the defendant should not have raised the matter in this pre-trial motion to dismiss under Rule 12(b) (2), Fed. R. Crim. P., but the Court has concluded that because of *Chapman, supra*, and because the issue is intimately bound up with central issues to be decided at trial, this ground for the motion to dismiss, if advanced more specifically by the defendant, should be deferred for determination at the trial. Rule 12(b)(4), Fed. R. Crim. P.

LUTHER W. YOUNGDAHL,
Judge.

December 19, 1962.

[Tr. 116] JULIEN G. SOURWINE a witness called by counsel for the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Hitz:

Q. Mr. Sourwine, please give your full name.

A. Julien G. Sourwine. The "Julien" is spelled with an "E" instead of an "A."

Q. Your present occupation, sir?

A. I am Chief Counsel of the Internal Security Subcommittee of the United States Senate.

Q. How long have you been its chief counsel, sir?

A. I have been chief counsel of the Subcommittee during two periods.

Q. Will you tell us what those periods were?

A. Yes, I was chief counsel about, sometime in 1954, [Tr. 117] until January of 1956 when I resigned from the committee for personal reasons and was gone the major part of the year. I became chief counsel again in 1957 and have been so until the present date.

Mr. Hitz: Would you give me government's Exhibit 4, please?

By Mr. Hitz:

Q. So that in November and December of 1955 and January 1956, you were its chief counsel, were you, sir?

A. Yes, sir.

Q. Were you in February, 1955?

A. Yes, sir.

Q. I would like to show you Government's Exhibit 4 which is a certification by the Chief Clerk of the Judiciary Committee with reference to the appointment of members of the Judiciary Committee to comprise the Subcommittee, and I would like you to examine the document and then I would like to ask you a question about it. (Pause)

The question is: Do you recall whether you were present at that February 7, 1955 meeting?

A. I do not have an independent recollection as to whether I was or was not. I probably was not.

Q. I see. Do you know the method in which or by which [Tr. 118] subcommittee members are appointed to comprise the Internal Security Subcommittee?

A. Yes, sir. The same way they are appointed for any other subcommittee: By the Chairman of the Committee with the consent of the full committee.

Q. I see. Was that done by this Judiciary Committee in the year 1955 by either resolution or by—well, first, was it done by Resolution or by some other Act?

Mr. Rauh: Objection. The witness has just testified he does not know anything about these appointments. He testified before he was not there, he had no independent recollection. Now, Mr. Hitz is asking him to say that this was all right even though he was not there.

By Mr. Hitz:

Q. Are you familiar with the practice of appointment of members to comprise the Internal Security Subcommittee of the Senate?

A. Yes, sir.

Q. If that now is your practice, will you answer my question—

The Court: Wait just a moment.

The objection is before the Court. Mr. Sourwine states that he was not present. Your experience with the [Tr. 119] committee has extended over what period of time?

The Witness: I went with the Judiciary Committee in 1944, Your Honor. I remained with the committee until the end of the first month of 1956 and returned in 1957 and have been with them since.

The Court: All right: Now, the Court understands that you are not asking the witness on this particular action.

Mr. Hitz: No, from his knowledge of the practice of

this committee in appointing members for this subcommittee.

The Court: The usual procedure?

Mr. Hitz: Yes, Your Honor.

The Court: All right. The objection will be overruled. The witness may answer.

By Mr. Hitz:

Q. Drawing on your knowledge of the procedure, Mr. Sourwine, was it customary for the appointment to be made by a resolution of the committee or by some other means?

A. Not by a resolution of the committee. The customary practice that I am familiar with is that at or near the beginning of a session, at one of the meetings of the full [Tr. 120] committee near the beginning of a new session of the Congress, that the Chairman will inform the committee of any changes in the various subcommittee rosters, and unless there is an objection raised, why, the committee has a motion on the matter—what he tells the committee with regard to the appointments, and that is it.

Q. I see. Thank you.

Did that practice pertain in February of 1955?

Mr. Rauh: Objection, your Honor. This is just another way of testifying to what happened at a particular moment.

The Court: No, if the witness knows if there was any change in procedure.

By Mr. Hitz: I should have asked it that way.

Are you aware of any change in that procedure you have testified to for the period February, 1955?

The Witness: No, sir. I am not aware of any change of procedure in February or about February of 1955, from what had been done in the years prior to that.

By Mr. Hitz:

Q. And since?

A. Or since.

Q. Thank you.

[Tr. 121] Mr. Sourwine, to your knowledge was the Internal Security Subcommittee in November, 1955, possessed of any information with reference to efforts by the Communist Party and its affiliated persons to infiltrate any branch of communications media in New York City?

A. Yes.

The Court: Wait just a moment. We will strike the answer. Do you want to object?

Mr. Rauh: I want to object until it is clear whether the question relates to documents which have been submitted to the Internal Security Subcommittee, and if such, the documents should be produced. If they are talking about oral conversations, they should name the person who has given them and whether they were received by this man.

In other words, a general statement about information permits all sorts of hearsay—a violation of the best-evidence rule. We had it at the last trial. It was the point I made in my opening statement. The question was asked the same way it was for the very purpose of allowing testimony to be given here about the contents of the documents that are not going to be produced, and about oral conversations with other people, and Mr. Sourwine. I think we ought to get clear what the type of the information is [Tr. 122] before we get into the question of what the information was, was it documents, was it oral, if it was oral, with whom was it communicated.

The Court: The Court feels that the question is a general one as to "Does this witness have knowledge," and the objection is made and the Court will overrule the objection and the witness may answer.

The Witness: Yes.

By Mr. Hitz:

Q. What information did the committee have—did the subcommittee have on the subject?

Mr. Rauh: Objection unless the question is, was it in the form of writing or oral? Object to that question as asked.

Mr. Hitz: That is cross examination by Mr. Rauh. It has nothing to do with the way the questions are asked on direct.

Mr. Rauh: If Your Honor please, this is exactly what happened. Mr. Sourwine put into the last trial the testimony of the contents of a letter.

The Court: Wait just a moment. We are not at that point.

Mr. Rauh: We are getting pretty close, I am afraid. [Tr. 123] The Court: No. As I understand the question, the question pertains to the general question as to the knowledge of the subcommittee.

Mr. Hitz: It does.

The Court: Or information.

Mr. Hitz: Or information in the hands of the subcommittee.

The Court: Yes.

Mr. Rauh: Now, if Your Honor please, if he states what information they had without indicating whether it was in documentary form, he is going to be able to do exactly what I said. He is going to be able to say—and then they are not going to produce the documents. Information that they have is largely documentary. Let him ask what documents they have. Let him describe the documents and then Your Honor can decide.

The Court: Let the witness answer the question. The objection is overruled. Then you can ask him on what he predicates the answer.

The Witness: If the Court please, I should like to be instructed in this respect: I am here with instructions from my Chairman not to disclose confidential matters respecting committee activity or what is in the committee [Tr. 124] files except as may be required by the Court. It seems to me, Your Honor, that this question, asking me for everything the committee knew about Communist infiltration in a certain area in New York City, that is a pretty broad question and I believe I would have to violate my instructions and I do not wish to do it unless Your Honor tells me I must.

Mr. Hitz: I will narrow the question. I think it is broad.

The Court: All right.

By Mr. Hitz:

Q. Will you state what information was in the hands of the Committee to your knowledge with respect to possible infiltration by Communist interests in the field of media of communication and in particular the New York Times.

Mr. Rauh: Objection, Your Honor. In response to the answer to this question, he would give general statements without indicating whether they came from documents which he will then say he is not going to produce. This is exactly what they did to us the last time. We fought through three courts up to the U.S. Supreme Court about this very question. I am asking that we clarify before he puts into the record hearsay, non best-evidence testimony, the basis of this information. Is it documentary information? Is it oral information? [Tr. 125] After that Your Honor can rule whether he can ask it. It seems to me I am entitled to find out whether this witness is now going to talk about documents, what is in documents which he won't produce under the Sixth Amendment and the best-evidence rule we are entitled that he not be allowed to testify to the contents of documents he will not produce.

The Court: The Court feels the objection is premature. The Court overrules the objection and the witness may answer the question.

The Witness: Your Honor, I am in the same dilemma I was in before. To answer this question I would have to attempt to recall from memory all of the documents in committee files relating to the subject regardless of to whom they may have related, with all of the information that the committee may have had that I know about or knew about at the time. I do not wish to attempt this and I believe I go far beyond my instructions unless the Court tells me I must.

The Court: Now, do you withdraw the question in view of the other testimony that has been already introduced?

Mr. Hitz: No, I do not. I will rephrase that question.

[Tr. 126] By Mr. Hitz:

Q. Mr. Sourwine, I would like you to relate to the Court that information in the hands of the subcommittee in November of 1955, to your knowledge, which led to the subpoenaing of the Defendant Robert Shelton for hearings in New York City. In the course of doing so I would like you to relate what information was in the hands of the committee with respect to efforts to infiltrate the mechanical and the editorial and news sides of the New York Times and to give that information as background information to what you had in mind concerning Mr. Shelton, and information about Mr. Shelton.

Mr. Rauh: Now, Your Honor please, this is the crux of the trial here.

The Court: The Court recognizes that.

Mr. Rauh: The witness the last time, in answer to a similar question, stated the contents of the document which he then would not produce. He said that the only thing they had was a certain document which he would not produce. This question calls for the contents of that document. I think we are entitled to know, first, whether he is going to testify to the contents of a document and if so, then I think Mr. Hitz has to produce the document. He can not have this man testify to the contents of a document under [Tr. 127] either the best-evidence rule or the Sixth Amendment, under Probable Cause, which is the heart of this case, without our having some right at that document. We, of course, believe it is exactly as I asked Your Honor before the witness took the stand: Were they going to produce the document? After all of this shilly-shallying, it is clear Mr. Hitz is not going to produce the document. If he were going to introduce it, he could hand it to him and have him identify it, and it would be over. He is trying to put in a document which the 6th Amendment gives us a right to see, as well as the Best-Evidence rule. On this, Your Honor, if there is any question about it—

The Court: What is your situation tomorrow morning, Mr. Sourwine?

The Witness: I am at the disposal of the Court tomorrow morning, sir. I have no conflicting engagements.

The Court: Can you be in here at ten o'clock?

The Witness: I can.

The Court: All right. We will adjourn now until 10 o'clock.

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[Tr. 139]

PROCEEDINGS

Mr. Hitz: We are ready to proceed with Mr. Sourwine's testimony, Your Honor.

The Court: All right, you may proceed.

Mr. Hitz: Your Honor, a number of questions had been put and discussed yesterday to Mr. Sourwine by me. I think, rather than asking them to be read, I will ask a new question.

The Court: All right.

Thereupon JULIEN SOURWINE a witness, having been duly sworn, was examined and testified further as follows:

Direct Examination (continued)

By Mr. Hitz:

Q. Mr. Sourwine, would you be good enough to tell us whether you are aware of what information had been communicated to the Chairman of the Subcommittee at the time that he issued the subpoena for Willard Shelton or whatever Shelton it was at or in November, 1955 in connection with this investigation—are you aware? Just answer, "I am aware" or "I am not aware."

Mr. Rauh: Objection, Your Honor, to any question of what was communicated to the Chairman, which is the way this question is now phrased.

[Tr. 140] The Chairman is available. In fact, he is under subpoena by us. There is no possible relevance of Mr. Sourwine's awareness of what has been communicated to the Chairman which is the way this question is phrased.

The Court: The Court had understood that the question embraced "of which he has knowledge."

Mr. Rauh: Maybe the reporter should re-read the question, Your Honor.

The Court: All right.

(The reporter read the pending question.)

Mr. Rauh: Objection on the ground, if this is a question of what information—this could only lead to what information the Chairman had. That is up to the Chairman to testify.

The Court: The objection will be overruled. The witness may answer.

By Mr. Hitz:

Q. Are you aware?

A. I know what I told him.

Q. Do you know now what you told him?

A. Yes.

Q. Are you aware now?

A. Yes.

[Tr. 141] Q. What did you tell him?

Mr. Rauh: Oh now, now wait a minute, Your Honor. This is exactly the same question as yesterday. He is going to now tell him the contents of the letter. We are entitled to know whether Mr. Sourwine is now going to testify what he told the Chairman out of a letter, and if it is a letter, we are entitled to the letter. It is unimportant what he told him other than what information the committee had. If it is a letter, we are entitled to it. Now, may I be heard on this, Your Honor?

The Court: You may.

Mr. Rauh: Yesterday, I believe a question was raised as to what happened at the last trial. At the last trial Mr. Hitz asked this question—

Mr. Hitz: Have you got the page?

Mr. Rauh: It is 48 of the Supreme Court Record.

Mr. Hitz: (Reading)

"Q. Mr. Sourwine, prior to the appearance by Mr. Shelton before the Subcommittee on December 7, 1955 in New York, did the committee, to your knowledge, have any information concerning the witness Robert Shelton; if so, what was it?"

It never occurred to me at that time that any attorney representing the United States of America would seek [Tr. 142] to put in the contents of a letter through a device like this, and I did not object.

On cross examination it came out that the question called for the contents of a letter which the Government would not produce. We made every effort to get that letter. We begged, we fought for that letter and we never got it.

Now, this is the same thing again. I think it is unethical conduct my the prosecution to try to put in the contents of a letter. Yesterday we objected to it by saying what information did you have. Now, he is trying to put in the contents by "What did Mr. Sourwine say to Senator Eastland."

We say there was no such letter. We are now just arguing an evidence rule. We are contending and we did last time, that this letter is a fabrication. The letter is eight years old. If there is any letter, it is eight years old. It has no name of an informer, it has a pseudonym on it. If there is a letter, they could produce it. Now, this morning for the Government to repeat his device to get this letter in, "What did you tell Eastland," I say is unethical conduct.

Mr. Hitz: I appreciate the implications of what Mr. Rauh has said and I resent them very much. They are not new [Tr. 143] to me from him. But I think he is unaware of what I am going to tell the Court. At least he pretends to be.

The only person who can issue a subpoena is the chairman of the Committee or someone to whom he has delegated the authority. In this instance there was no delegation. The Chairman of this subcommittee had the power and he issued the subpoenas. If there is any test that needs to be made—and I am not sure that there is—of the reason for a subpoena

to be issued, that test will be at the level of the Chairman of that committee. It would not be—if there is a test—sufficient to show that somebody in the staff had certain information and that the Chairman, unaware of that information, issued the subpoena. I am not saying that he could not do it. What I am saying is, if there is a test of reason to call that information used in the test for the reason to call, should be communicated to the Chairman. Therefore, my question here is: Is Mr. Sourwine aware of the information that had been communicated to the Chairman with reference to why Mr. Shelton ultimately was desired and what the investigation was in which he was to be called.

So that it is at the Chairman's level. Now, Mr. Rauh is greatly concerned about this document. We are not endeavoring to prove the contents of that document [Tr. 144] which is the best evidence rule. We are endeavoring to prove what it was that had been communicated to the Chairman of the Committee that caused him to issue the subpoena. Just in case there is some rule of reason to call. I do not think there is. There may not be, but there is language in the Barrenblatt case that causes me as attorney for the Government to meet the test if there is one or if it is there.

Now, I say again we are not proving the contents of the document. That document could be in the safe of the staff, and if the Chairman never knew about it, then he did not issue the subpoena with awareness of it.

I am now showing awareness of it, just to be a possible test of reason to call.

Mr. Rauh: The witness who can testify to what he is aware of is the Chairman of the Committee. I cannot possibly see, if we are now testing out whether Mr. Eastland knew something at a given time, there can be any question but that Mr. Eastland is the witness. He may have told him something he did not listen to. We want to know what Mr. Eastland knew. There is no possible relevance except this is a trick to get in the contents of a letter which your Honor was considering last night with a different question, namely, what information did the committee have.

[Tr. 145] Now, he is going to tell us, "Well, the committee had 'X' and the 'X' is in the letter that they won't produce. Well, if it is a question of what Senator Eastland knew, well, I think Senator Eastland is the witness to testify what he knew, not this witness to put in a document by saying "I told Senator Eastland what was in that document."

Mr. Hitz: I have no reply. I invite the Court's ruling.

The Court: The Court has had the opportunity of reading the cases referred to by both counsel for the prosecution and the defense—namely, the Barrenblatt and Watkins and Wilkinson cases.

The Court is of the opinion that the objection in this case should be and therefore is overruled. So the witness may answer the question.

Mr. Rauh: Your Honor please, I have been up to the Supreme Court once with this. It looks like we are going again. But I think we are entitled to a statement of a reason why we are being overruled. Is your Honor saying the Government does not have to prove probable cause or whether Your Honor is saying the witness may testify to the contents of a document that is not produced? I think we are entitled [Tr. 146] to have that, your Honor, on the record.

Mr. Hitz: I wonder whether I can reply, if he is through, before the ruling.

The Court: Yes.

Mr. Hitz: In the case of Herman Liverright which is, you might say, in some respects a companion case to this one, it grew out of a somewhat similar situation and was decided on the same day as the Shelton case and came from the same subcommittee. Much of the same problem was raised.

The Court denied to counsel for Liverright at his trial here the right to summon, scrutinize and examine the documents in the file of the committee with respect to Liverright. A complaint was made by counsel above by way of claiming error, and in the Court's—the Court of Appeals 5th ruling, in sustaining the conviction on all of

the points, the Court of Appeals had this to say. The citation is 280 Fed. 2d. It immediately follows, I think, in that volume of the Shelton Opinion.

The Court of Appeals said, "The argument that appellant is entitled to see and cross examine concerning the information which led to the subcommittee's issuance of a subpoena for him is without any merit on this record. It is plain here as in Barrenblatt that the subcommittee [Tr. 147] did not call appellant as part of a broadside or dragnet process.

"From various confidential sources which committee counsel testified they had found reliable in the past there were strong indications that appellant may have engaged in Communist Party activities of the particular kind which the counsel stated were under special scrutiny. That is structural revisions in their network in order to avoid detachment."

I am interrupting. It is slightly different.

(Reading.)

If the information received by the subcommittee concerning appellant's activities is true, his actions were not of a character protected by the first amendment having to do with his affirmative defense after he refused."

Now, that is not only what the Court of Appeals has said, but logic and the realities of the situation—that is, whom the subcommittee or a committee of Congress may call, dictated that must be the law. I suggest that as the reason why we feel that they are not entitled to cross examine all of the material or this material in the files of the committee.

Mr. Rauh: If your Honor please, the Liverwright [Tr. 148] case has nothing to do with it. It was, in the first place, not a probable cause and the second place, Mr. Liverwright had been named. Mr. Shelton was never named by anyone. You had pages of Burdett and Burdett never named him. No one ever named him.

Excuse me. I have no right to argue further, Your

Honor, unless you permit me. You made a ruling. I only ask, and what I am saying now is in relation to trying to get this record clear.

You have ruled and I withhold any further argument but my question to which Mr. Hitz arose and I do not see why he should have risen when I was only asking for clarification, is it your Honor's ruling so I can be guided in the future—

The Court: You are predicating your argument on an answer that the witness has not yet given.

Mr. Rauh: But which I know he is going to give.

The Court: But I do not know.

Mr. Rauh: Can I ask him this question? Can I ask the witness before this case is determined, because we are deciding the case now, your Honor, on this point.

May I ask the witness whether the information he [Tr. 149] relayed to the Chairman that he is about to testify to was the contents of a document received under a pseudonym? May I ask him that question?

The Court: Yes, you may ask the question.

Mr. Rauh: Mr. Sourwine, was the statement you made to the Chairman concerning subpoenaing the witness Shelton based upon a document which had been received by someone on the committee over the name of a pseudonym?

The Witness: Will you repeat that question.

The Court: Read it, please.

(The reporter read the question.)

The Court: I believe in fairness, Mr. Rauh, the question should also include "only." Because I believe that is your point, is it not?

Mr. Rauh: If there was other information, he testified the last time there was not any. But if there was other, I would like to know where that came from before we just have this general statement of hearsay, your Honor.

Now, would the reporter please read back my initial question to Mr. Sourwine?

(The reporter read the question again.)

The Witness: The only way I can answer that question is to say in part. May I explain.

[Tr. 150] The Court: You may.

The Witness: I did not mention any such communication to the Chairman. I did tell the Chairman that I was satisfied from information in the possession of the committee, meaning largely in the possession of the staff and of myself, of course, that the persons on the list of witnesses which was presented for the issuance of the subpoenas had information that would be valuable to the committee, and I then categorized those witnesses—these we know to be Communists and these we believe to be connected with Communist activities—several categories.

The information which I had specifically with regard to Shelton did come from such a communication as Mr. Rauh has asked. Have I made this clear?

The Court: You have.

Mr. Rauh: On this basis, I object to the question and I ask if the objection be overruled, we be informed whether the Court is now holding that the probable cause defense is invalid or whether the Court is holding that he may testify to the contents of a document without the government producing it.

Mr. Hitz: Your Honor, Mr. Rauh—the witness is about to testify to what he communicated to the Chairman. [Tr. 151] He is not trying to prove here the contents of a document as such. With that I concur in inviting the ruling of the Court.

The Court: All right. Well, the objection made by counsel for the defendant will be overruled on the grounds that this Court is not of the opinion, first, that it is empowered to set the standard of inquiry, of an inquiry authorized by Congress to a committee who, in turn, authorizes the subcommittee; and if the subject matter is within the scope of that resolution that the information given to any member of that committee, that this court is not to question the motive on which a subpoena is issued.

Mr. Rauh: In view of your Honor's ruling, I now object to the question on the ground it is irrelevant. Your Honor has ruled you are not going to determine whether the

committee had probable cause for calling him. Therefore, I object to any testimony as to whatever information he had as irrelevant.

The Court: Overruled. You may proceed.

The Witness: To answer your question, Mr. Hitz, I told the Chairman——

By Mr. Hitz:

Q. I wonder if, before you proceed, you have answered [Tr. 152] my question, that you are aware of what was communicated in this connection which led to Mr. Shelton's subpoena.

A. I am. By me. I know what was communicated by me.

Q. Yes. Now, you have also indicated that the information you communicated to the Chairman was categorized.

A. Yes.

Q. And it is at that point that I want to take up a further question of you. Would you please tell us if you gave the Chairman any information with respect to the supposed infiltration of newspapers in the City of New York at about that time?

A. I did.

Q. Did you give the Chairman any information with respect to alleged infiltration of the New York Times in particular?

A. Perhaps I should make this clear. The answer is I did but in the same context of my previous answer. I was telling the Chairman the conclusions I had arrived at.

Q. Yes.

A. I was not giving him information to support those conclusions.

Q. Well, now, your answer to my last question: Did the information include any alleged infiltration of the New York Times [Tr. 153] in particular?

A. Yes, in particular the New York Times and other newspaper in New York.

Q. I have just covered other newspapers. I am particularizing the New York Times.

A. Yes, sir.

Q. Within the New York Times did your information have to do with the same subject with respect to the news and editorial side and also the mechanical side?

A. Yes.

Q. Now, are those categories of information you gave to the Chairman?

A. They are.

Q. I would like you to tell us what you told the Chairman in that regard with respect to those several categories in the order in which I asked you: The newspapers generally, New York Times, particularly, and within the New York Times both sides of the house.

A. I told the Chairman that——

Mr. Rauh: I think, for clarification of the record, I want to object to his stating anything that comes from a document which the committee had which they will not produce, or comes from an oral statement he has had with [Tr. 154] third parties without describing who the third party was.

The Court: All right. Your objection will be overruled.

The Witness: I told the Chairman that I was satisfied, from the information available to the committee, that the situation as it had been described by Winston Burdett to have existed at an earlier time. That is the the existence of Communist cells on several New York newspapers still existed.

I told him that, among these newspapers were several—and I named them, and one of the ones I named was the New York Times.

I told him that it was a special situation in the New York Times because we also had enough information to satisfy me that there was a definite effort by the Communist Party under way at that time to infiltrate Big Six which is the New York Typographical Union and that this appeared to be centered in the Composing Room of the New York Times.

I told him a little story about a particular woman who had had a job——

Q. Can you name the woman?

A. Yes.

Q. Will you do it?

[Tr. 155] Did she testify in Executive Session?

A. Matilda Lanceman was her name. She had been a secretary to top executives of several New York newspapers.

Q. Will you name them?

A. She had been secretary to Joe Barnes on the New York Star.

She had been secretary to Desmond—I think John Desmond on the New York Times.

She had left her job with Desmond, resigning that position which was a very good job of its kind, had taken a situation—had taken a six months course in linotype and had then moved into the composing room. She got some kind of a special dispensation from her apprenticeship requirements and moved into the composing room as a linotype operator.

I told the Senator that this appeared to me to be a case of Communist colonization. I felt sure she was under orders to make that move so as to be in a position to direct Communist activity in the new spot.

I told the Senator that with respect to those on the news side of the Times, whose names were on the list of subpoenas—

[Tr. 156] Q. Before we get to the names on subpoenas—have you told us about all you stated to the Chairman concerning the general situation there and Matilda Lanceman in particular; before we get to the Shelton matter, or any individual names that were subpoenaed, I want to cover the generalities first. Have you done so?

A. I think so, sir. I probably could supply more detail. You must understand I do not remember exact language of my conversation with the Chairman. I am not purporting to give it.

Q. Of course not. I understand that. You are not asked for that, sir.

Now, with respect to Miss Lanceman again, did you communicate to the Chairman any information with respect to Miss Laneman's reported or reputed activities prior to her going to the New York Times in the secretarial department?

A. I did.

Q. What did you tell him with regard to those activities of Miss Laneman?

A. I told him that Miss Laneman had, according to my information, been connected with the Communist Party for a long time, and that she did some years prior while [Tr. 157] connected with the Newspaper Guild, participate, or been active in placing Communists on jobs on newspapers in New York City.

Q. Do you recall whether you stated to the Chairman any particular newspapers, including the New York Times, that your information indicated to you that she had so engaged?

A. I do not think I did.

Q. You say that your information that you communicated to the Chairman was that she had been connected with the Communist Party and had been connected with the Newspaper Guild. I am asking you if you had information that you communicated to the Chairman that she was a member of the Communist Party and a member of the Newspaper Guild?

A. Yes, sir. I told the Chairman that she had been a member of the party and that she had been active in the Newspaper Guild.

Q. Now, with reference to the date of the issuance of these—well, now, you were going to go on and get more specific and into the subject of the names that were submitted to him to be possibly subpoenaed in these New York hearings of December. Will you get into that subject and tell us what you told the Chairman in that regard?

[Tr. 158] A. I told him simply that the people who had been subpoenaed on the news side of the New York Times—

Q. I am sorry, to get before the date of the subpoena to the dates when they were being considered.

A. I misspoke myself. I am talking about the same time, Mr. Hitz. I am sorry.

Q. Thank you.

A. I told him that the individuals whose names were on the subpoena list who were employees on the news side of the New York Times were individuals whom I thought had information about Communist activities on the Times and

would be able to be helpful to us. I did not go into detail with respect to each one of them, Mr. Hitz.

Q. I see. Was the name of Shelton on that list of prospective witnesses?

A. Yes, sir.

Q. Discussed with the Chairman?

A. Yes, sir.

Q. And on that list of prospective witnesses discussed with the Chairman was there a first name supplied for the Shelton individual?

A. Yes.

Q. What was the name?

A. Willard.

[Tr. 159] Q. Was that name on at the time the list was submitted to the chairman so far as you are aware?

A. Yes, I am sure it was.

Q. And subsequent to that—

Before we get on to this next matter, did your information you communicated to the Chairman have any reference to the Shelton's first name, and how—the first or the last name of that Shelton was arrived at?

A. No. At that time we did not discuss Mr. Shelton.

Q. I see. Just the list was discussed.

Mr. Rauh: I did not hear that.

The Witness: At that time we did not discuss Mr. Shelton's name. The only name I recall having mentioned to him was the name of Miss Landsman.

By Mr. Hitz:

Q. Mr. Sourwine, at the time you submitted to the Chairman a list of prospective witnesses in the discussion that you have related here, did you have a first name for the Shelton on the news side of the Times?

A. I am ashamed to say I cannot answer that. The name Willard was a mistake. I was guilty of the mistake, as anyone is, how he got on that list. I knew what Shelton I wanted. But I should have caught the fact that the [Tr. 160] name was wrong, and I did not catch it; I let that just go to the Chairman and I presented it to him, and

I let a subpoena be issued without catching the fact that Willard Shelton was not the man we wanted.

Q. I see. For what reason?

A. I can only assume I did so because I thought I was in control of the list and the idea that there had been an error did not creep into my mind and I was not sufficiently familiar with the name of Shelton to look at the list and catch the error. That is all I can say.

Q. Well, have you or are you saying that a Shelton with an unknown first name was sought or a Shelton with a name other than the name of Willard was being sought?

A. A Shelton by the name other than Willard was being sought. I knew, or had been told and should have known that the Shelton we wanted was not Willard Shelton.

Q. And where did Willard Shelton work, and by whom was he employed?

A. Willard Shelton was a newspaperman working in Washington. I do not remember who his employer was.

Q. Was he employed by the New York Times at that time?

A. I am sorry. I cannot tell you, sir.

Q. In any event, the one you were seeking was employed where?

[Tr. 161] A. In the news side of the New York Times, New York City.

Q. I see. Is that why you say that Willard Shelton was not the proper name for the person you were seeking?

A. Yes, sir.

Q. Is that about all of the information that you imparted to the Chairman prior to the issuance of these subpoenas which included the one which was taken before Willard Shelton?

A. Yes, sir.

Q. Now, Mr. Sourwine, will you state what transpired after that with respect to obtaining the presence of Mr. Robert Shelton, now on trial, before the subcommittee?

Mr. Rauh: Could we have the question repeated?

The Court: Yes, Mrs. Sweet.

(The question is read.)

The Witness: Yes, sir.

By Mr. Hitz:

Q. Proceed.

A. All the subpoenas were given to a staff member to take to New York and be served.

Q. Will you give us the approximate date they were issued? Give us the exact date. Do you have a copy of the [Tr. 162] subpoena here?

A. Yes, sir.

Q. I am asking now for the date of the issuance of the subpoena for Willard Shelton.

A. November 11, 1955.

Q. Now, with that, will you tell us what transpired that caused him to be before the committee?

A. This subpoena, with others, was given to Mr. Halleck, a member of the staff, to be taken to New York City to be served. Mr. Halleck called me—

Mr. Rauh: Objection. You can not testify what Mr. Halleck told him, your Honor.

The Court: All right.

Mr. Rauh: Mr. Halleck was in Judge McGuire's Courtroom yesterday. We have gotten away with some rules of evidence, but he can not tell here what Mr. Halleck told him.

The Court: All right.

Mr. Hitz: That is not a proper objection for the reason we are not trying to prove the truth of what Mr. Halleck said. We are trying to prove that fact that he said it. It is not hearsay at all.

Mr. Rauh: I object, your Honor.

There is no relevancy to what Mr. Halleck said. [Tr. 163] The relevancy is to what actually happened at the Times. Mr. Halleck is available to testify as to what happened at the Times.

The Court: New York Times, is that it?

Mr. Rauh: Yes, the New York Times.

Mr. Hitz: It is the fact Mr. Halleck said something to him and he made a reply. He can testify to both of those things. It is not objectionable as hearsay. We are not trying to prove the truth of what Mr. Halleck told him on the telephone.

The Court: No, but the question that is obviously before the Court—isn't Mr. Halleck available?

Mr. Hitz: Yes, he is, to both sides.

The Court: Ask the witness as a result of the conversation what, if anything, did he do?

Mr. Hitz: Yes. Mr. Halleck is available to both sides. He was called by the defendant at the last trial.

The Court: All right.

The Witness: I can summarize your question without mentioning Mr. Halleck, Mr. Hitz.

Mr. Rauh: The Judge's direction to you is not to summarize. The Judge's direction is what did you do after Mr. Halleck called?

[Tr. 164] Mr. Hitz: I object to the defense counsel cautioning the witness and giving him instructions.

The Court: You may proceed.

The Witness: I would like to ask instructions from the Bench now. Sir, I am honestly in a quandary. Am I trying to answer Mr. Hitz's question, or has the Bench instructed me otherwise?

The Court: Mr. Sourwine, as a result of a telephone call that you received, what, if anything, did you do?

The Witness: As a result of that telephone call, I caused a new subpoena to be issued for Mr. Shelton under his correct name and had it served upon him.

The Court: All right.

By Mr. Hitz:

Q. Do you have the returned copy, or copies of both of those subpoenas with you?

A. I have copies of both of them but there was no return on the first one, legally. I have the return form and I have Mr. Halleck's endorsement on it, and I have the return of the Marshal; with respect to the other subpoena, the second subpoena, the subpoena served on Mr. Robert Shelton in the correct name I have the return.

[Tr. 165] Q. When was the second subpoena issued?

A. November 23, 1955.

Q. When was the first one served by Mr. Halleck?

A. This return says November 16, 1956.

Q. And the return date, that is, the date on which the first subpoena called for Willard Shelton's appearance.

A. Wednesday, November 23, 1955.

Q. So that this first one, typewritten to Willard Shelton, was issued on November 14, 1955, by the Chairman, is that correct?

A. Yes, sir.

Q. It was served on November 16 in New York by Mr. Halleck, and does it so state?

A. It does so state on the back, yes, sir.

Q. And it was to have Mr. Willard Shelton appear on November 23, is that correct?

A. Yes.

Perhaps I should make one thing clear. This was not served on Willard Shelton.

Q. I will come to that.

A. This is marked—

Q. I will come to that. You let me come to it.

Now, is it correct that Willard Shelton's first [Tr. 166] name, that is, the name Willard, is typed on that subpoena?

A. Yes.

Q. Is that scratched out and the name "Robert" written on it?

A. On my copy "Willard" is scratched out and "Robert Shelton" is printed in ink below.

Q. So the answer is yes.

A. Well, the answer is exactly what I just said, Mr. Hitz. They did not, as you suggested, simply strike out "Willard" and insert "Robert." The Willard is stricken but the full name "Robert Shelton" is printed below.

Q. I stand corrected. Did you give any instructions or permission for anyone to make that change in that subpoena over the telephone or anywhere else?

A. No, I did not.

Q. Did you discuss that matter with Mr. Halleck when he talked with you over the phone?

A. No, sir.

Q. Did you give him any instructions as to who on the Times—other than the last name of Shelton—should be interviewed and spoken to by him with respect to these hearings?

A. Yes, sir.

Q. What did you say to him?

[Tr. 167] A. Robert Shelton?

Q. What did you say about Robert Shelton?

A. I said it is obvious he is the man we want because he is the only Shelton on the news side.

Q. Did you tell Mr. Halleck—did you give him any instructions what to do with respect to your desire for the Robert Shelton?

A. It could be construed that way. I told Mr. Halleck to tell him so, to tell him, to tell Shelton, tell Robert Shelton that he is the man we wanted.

Q. Wanted for what?

A. To testify, sir.

Q. But you did not give Mr. Halleck permission or instructions to change the name "Willard" to "Robert Shelton"?

A. This was not discussed, sir.

Q. I see.

Now, the second subpoena that does read "To Robert Shelton," and it reads that way on the typewriting on that subpoena, does it not, sir?

A. Yes, sir.

Q. It was issued on what date?

A. November 23, 1955.

Q. And returnable on what date?

[Tr. 168] A. Calling for the appearance of the person subpoenaed on Wednesday, December 7, 1955.

Q. Now, that is a different return date, that is, the date for appearance, than in the first subpoena issued to Willard Shelton, is that right, sir?

A. Yes, it is.

Q. Are you able to say whether or not the hearing at which Mr. Shelton was initially sought had been postponed?

A. I think some witnesses were heard on the date named in the first subpoena. Mr. Shelton's appearance was postponed.

Q. And that accounts for the difference in the return days in the two subpoenas?

A. Yes.

Q. You have already accounted for the difference in the

first names of the two individuals, or rather, of the person to whom the subpoena was addressed?

A. Well, I have accounted for it about as much as I can, sir.

Q. All right.

The second subpoena which is the one reading, "To Robert Shelton," was served by what body?

A. It was served by a Deputy U.S. Marshal in the [Tr. 169] Southern District of New York.

Q. Thank you.

A. I cannot read the name. Michael W. Radue or Radney—R-a-d-n-e, or R-a-d-u-e.

Q. Mr. Sourwine, did Mr. Robert Shelton, the man now on trial, appear before the Subcommittee?

A. He did.

Q. And when did he first appear?

A. December 7, 1955.

Q. In what city?

A. New York City, Foley Square.

Q. Was that in Executive or Open Session?

A. Executive Session.

Mr. Hitz: Your Honor, I would like to invite the Court's attention to Government Exhibit 9. Could I have No. 9, please. I am sorry, I want 10.

This is the first—this is the certification from the president of the Senate to the U.S. Attorney of the contempt proceedings, shortly put, concerning Robert Shelton.

Actually it is a certification of the resolution of the Senate which cited him to the United States Attorney for action, and accompanying that is also the report from [Tr. 170] the Committee, reporting the facts of the alleged contempt, being report No. 1934, which report contains the testimony of Mr. Shelton on December 7, 1955 in New York in executive session, that is, his first appearance. It also contains the transcript of most of the hearing concerning Shelton, at which he later appeared in Washington January 6, 1956, which is the subject of this case. I say, "Part of it" because it does not contain the opening statement

made in the indictment hearing made by the Chairman and other members of the committee. For that reason that is incomplete.

However, this report No. 1934 which is an attachment and part of government 10, the certification, is the only place at which there is printed or recorded that I am aware of for public consumption the Executive testimony of Mr. Shelton.

I am now going to ask Mr. Sourwine some questions concerning that Executive appearance and ask him to read it. I have a copy of the government print which is precisely the same physical object which is contained in the certification, it is the same report, which I can hand to the Court for a working copy. The evidence copy will be here available for Mr. Rauh if he cares to follow it. I will then shortly ask Mr. Sourwine to read the Executive [Tr. 171] testimony from that.

The Court: Is there objection?

Mr. Rauh: No objection.

The Court: You may proceed.

By Mr. Hitz:

Q. Do you have a copy of this, Mr. Sourwine, Report No. 1934? I will hand you the evidence copy, then. This is part of 10.

Would you be good enough to read from that report, from it and next on page 3? You may skip the headings there and commence with the "Subcommittee met pursuant to"—

The Witness: The Subcommittee met pursuant to adjournment at 9:20 a.m. in Room 36 U.S. Court Building Foley Square, Senator Thomas C. Hennings, Directing Chairman, Presiding.

"Present: Senators Hennings and Jenner.

"Present. J. G. Sourwine, Benjamin Mandell, Research Director.

"Senator Hennings. You do solemnly swear that the testimony you are about to give at these hearings will

be the truth, the whole truth and nothing but the truth, so help you God?

"Mr. Shelton. I do.

[Tr. 172] "Senator Hennings. Be seated, Mr. Shelton.

"Mr. Sourwine. Will you give the reporter your full name, sir?"

Mr. Rauh: Just a moment, please.

The Court: Wait just a moment.

Mr. Rauh: Your Honor please, we will waive the reading of the transcript. It is available to be read. It is a full and a dull document—some seven or eight years ago. I do not see it gains anything to read it now. We will be happy to waive reading it and have it typed in the record at this point.

Mr. Hitz: Will you proceed? We do not care to engage in the waiver, your Honor. If your Honor does not care to hear it, that is another matter.

The Court: No, you may proceed in your own fashion but counsel for the defendant has already agreed that it become part of the record.

Mr. Hitz: Yes.

The Court: The Court understands that the counsel for the defendant states that it may be incorporated in the record, aside from an exhibit.

Mr. Rauh: Yes, your Honor.

[Tr. 173] Mr. Hitz: Then that being the situation, I think it is entirely—as to whether the Court would care to have it read at this time, with possible comment from Mr. Sourwine, who was the interrogator—if any should come up through me or Mr. Rauh or whether the Court should prefer to read it as an exhibit at some time other than this.

The Court: The Court will read it at another time. In the event that there is any question on direct or cross examination, the witness will be free to refer to the report.

Mr. Hitz: If your Honor please, I think I would like to alter my position with respect to not reading this. We are next going to read the hearing at which the refusals were made that resulted in this case, and there are certainly going to be questions with respect to that hearing. I believe that all of that will be importantly illuminated by the

executive testimony. I think that if the Court heard the indictment hearing without hearing the preceding hearing here, which is not the indictment hearing at all but preliminary to it in a sense, that the Court would not receive the indictment hearing in the light in which we feel that it should be. Therefore, I would like to request the Court to permit me to go forward in this way.

The Court: Then you may proceed.

[Tr. 174] By Mr. Hitz:

Q. Would you continue reading now, Mr. Sourwine?

A. I am not sure where I left off. I will begin at the top of page four. (Reading.)

"Senator Hennings. Be seated, Mr. Shelton.

"Mr. Sourwine. Will you give the reporter your full name?

"Mr. Shelton. Robert Shelton.

"Mr. Sourwine. Do you have a middle name or initial?

"Mr. Shelton. No, I have not.

"Mr. Sourwine. And your address?

"Mr. Shelton. 191 Waverly Place, New York 14.

"Mr. Sourwine. And your business or profession?

"Mr. Shelton. I am a copy editor for the New York Times.

"Mr. Sourwine. You say a copy editor, or the copy editor?

"Mr. Shelton. A copy editor.

"Mr. Sourwine. How many copy editors are there, sir?

"Mr. Shelton. Oh, I believe there are about 60.

"Mr. Sourwine. How long have you been employed there, Mr. Shelton?

"Mr. Shelton. It will be five years in February.

[Tr. 175] "Mr. Sourwine. Where did you work before that, sir?

"Mr. Shelton. Prior to that I worked with Fairchild Publication.

"Mr. Sourwine. For how long?

"Mr. Shelton. About three months.

"Mr. Sourwine. And before that?

"Mr. Shelton. I was not working in the newspaper field. I was working for a mail-order house for a few months. Prior to that, unemployed; prior to that going to college.

"Mr. Sourwine. Are you a college graduate, sir?

"Mr. Shelton. Yes.

"Mr. Sourwine. What college?

"Mr. Shelton. Northwestern University.

"Mr. Sourwine. Your degree?

"Mr. Shelton. Bachelor of Science.

"Mr. Sourwine. You graduated in what year?

"Mr. Shelton. 1950.

"Mr. Sourwine. Where were you born?

"Mr. Shelton. Chicago, Ill.

"Mr. Sourwine. Did you live there in Chicago before and after the time you graduated?

"Mr. Shelton. The last two years of college I [Tr. 176] resided in Evanston, Ill., which is a suburb of Chicago.

"Mr. Sourwine. Were you at any time active in the Newspaper Guild?

"Mr. Shelton. Is that question pertinent to the scope of this inquiry?

"Mr. Sourwine. I may say what we primarily are doing here is clearing up a question of identity and one way to do that is to make the record clear about yourself and your associations.

"Mr. Shelton. I understand that. That is a matter of public record; that I have been a member of the Newspaper Guild.

"Mr. Sourwine. For how long, sir?

"Mr. Shelton. Well, I joined the guild when I was at Fairchild Publications; that would be sometime in the winter of 1950.

"Mr. Sourwine. You were not then with the Guild in 1947?

"Mr. Shelton. No, I was a college student then.

"Mr. Sourwine. Were you ever Washington correspondent for PM or in any way connected with PM?

"Mr. Shelton. No, sir.

"Mr. Sourwine. And you are not a member of the [Tr. 177] Communist party and you never have been; is that right?

"Mr. Shelton. I have a brief statement I would like to introduce at this point if I may.

"Senator Hennings. Do you care to read it, Mr. Shelton?

"Mr. Shelton. Yes, I would.

"Senator Hennings. Of course, that is not responsive to the question. I think first you had better——

"Mr. Sourwine. This is an executive session.

"Senator Jenner. Let him read it.

"Mr. Shelton. I am a loyal American who believes in and firmly supports the Constitution of the United States. Because of that strong belief in the Constitution I am forced to say that this inquiry raises serious doubts in my mind.

"I must ask this question: Is an inquiry into the beliefs and associations of a citizen forbidden by the first amendment to the Constitution? That amendment says that—Congress shall make no law . . . abridging the freedom of speech or of the press or the right of the people peaceably to assemble . . .

[Tr. 178] "Several weeks ago the venerable scholar, Professor Alexander Meiklejohn, testified before the Senate Subcommittee on Constitutional Liberties. He said in part:

" . . . no subordinate agency of the Government has authority to ask, under compulsion to answer, what a citizen's political commitments are. The question "Are you a Republican?" or "Are you a Communist?" when accompanied by the threat of harmful or degrading consequences, if an answer is refused, or if the answer is this rather than that, is an intolerable invasion of the 'reserved powers' of the governing people. And the freedom thus protected does not rest upon the fifth amendment "right" of one who is governed to avoid self-incrimination. It expresses the constitutional authority,

the legal power, of one who governs to make up his own mind without fear or favor, with the independence and freedom in which self-government consists.'

"Therefore, gentlemen, in asking me, "Am I, or have I ever been a member of the Communist Party", or [Tr. 179] 'Have I any knowledge of Communist activity or conspiracy in the newspaper field or elsewhere,' I feel that, however unknowingly or unwittingly, you are infringing on my rights under the first amendment.

"The question, I feel to be even a further violation of the First Amendment because of my profession as a newspaperman. Freedom of the press is a broad right and a broad philosophy. It belongs not only to the publishers of newspapers and periodicals, but also to everyone in this country. It especially belongs to anyone connected with writing or editing what will appear in print. Thus, an inquiry into the beliefs and associations of a newspaperman is by direct connection an inquiry into the press and a threat to the freedom of the press as guaranteed under the first amendment.

"One of the reasons I was attracted to the New York Times as a newspaper to work for is the philosophy under which it operates. It is a credo that many papers in this country would be happy to call their own. Adolph S. Ochs, assuming the ownership of the Times, wrote in a signed editorial on August 19, 1896:

" 'It will be my earnest aim that the [Tr. 180] New York Times * * * * give the news impartially, without fear or favor, regardless of any party, sect or interest involved * * * *'

and further,

" 'nor will there be a departure from the general tone and character and policies * * * unless * * * * to intensify its devotion to the cause of * * * no more government than is absolutely necessary to protect society, maintain individual vested rights and assure the free exercise of a sound conscience.'

"Speaking not for the Times but as an individual newspaperman who supports these statements by Mr. Ochs, I must say that this committee's summoning of me to inquire into my associations and beliefs substantially affects my role as a sub-editor in passing upon stories for publication in a daily newspaper.

" 'Fear and favor' are the key words here. I am placed in fear of having my loyalty considered suspect and being faced with legal and economic penalties if I do not, while freely exercising my sound conscience, answer this committee's questions. I am obliged to seek the favor of this committee to guard my personal integrity and the integrity of the newspaper profession in general and the organization for which I work, in particular.

[Tr. 181] "The twin evils of fear and favor do not apply to me alone. They would apply also if this body were to summon a writer or editor of a newspaper that advocated white supremacy and expressed condemnation of the Supreme Court's ruling on desegregation. An inquiry into the beliefs and associations of such a person would, I feel, also be an invasion of freedom of the press.

On the basis of these considerations, I must respectfully arrive at the conclusion that this inquiry is a violation of my rights under the first amendment to the Constitution in respect to freedom of speech and of the press and peaceable assembly.

"Furthermore, the inquiry is beyond the scope of the committee.

"Senator Hennings. In that event, are we to assume, Mr. Shelton, having read your statement into the record, that your objection goes to the entire inquiry or to the question which has been put to you?

"Mr. Shelton. The actual basis for the inquiry has not been stated to me nor does it appear on the subpoena.

[Tr. 182] "Senator Hennings. I understood you to

say that you considered this inquiry to be an invasion of your rights.

"Mr. Fraenkel. Certainly in so far as this particular question is concerned.

"Senator Hennings. That is what I wanted to get at, whether it is the question.

"Mr. Fraenkel. As to whether these other questions—certain questions have been asked and have been answered.

"Mr. Sourwine. Counsel has not been identified; if he is going to testify for the witness, let's have his name.

"Senator Hennings. Give your full name and office address.

"Mr. Fraenkel. Osmond K. Fraenkel, 120 Broadway, New York.

"Senator Hennings. Thank you. Counsel was interrupted in the course of making his statement.

"Mr. Fraenkel. As to whether any other questions would be answered would depend on the character of the questions.

"Senator Hennings. So the record may reflect the circumstances as they actually are, do we understand [Tr. 183] that Mr. Shelton refuses to answer the question that counsel has put to him on the grounds which he stated in the statement?

"Mr. Shelton. That is correct.

"Mr. Sourwine. That ground is the first amendment and the jurisdiction of the Committee.

"Mr. Shelton. That is correct.

"Mr. Sourwine. I believe, Mr. Chairman, that the committee must refuse to accept the first amendment as a ground for refusing to answer the question and that the committee also cannot endure a direct challenge to its jurisdiction and the witness should be instructed to answer the question.

"Mr. Shelton. I stand on my statement.

"Senator Hennings. The record will so reflect.

"Mr. Sourwine. I will state, Mr. Chairman, I am greatly surprised. I did not expect this. We came into

this as I explained to the Senators and to put on the record to clear up a question of identity. The record will show that the witness was not charged with being a Communist. Counsel said you are not a Communist and you never have been; isn't that right?

"Mr. Fraenkel. Obviously that involves——

[Tr. 184] "Mr. Sourwine. The question does of course involve the answer but I must admit to the chairman, I am taken by surprise.

"It may be that we shall have to question this witness more at length later. I would like to ask just a couple of questions now because of the statement which has been made.

"Senator Hennings. I might suggest to Mr. Shelton and to counsel that this committee here and now is not going to determine or undertake to determine the legal question which has been raised by this objection.

"Mr. Fraenkel. Naturally.

"Senator Hennings. And the refusal to answer the question. For the record, in order that the issue may be made, the witness has been asked and directed to answer the question and has refused to do so.

"Mr. Sourwine. Do you, sir, consider the Communist Party to be just another political party just like the Republican Party which is the connotation in which you mentioned it?

"Mr. Shelton. I wish to stand on the statement which I have made.

"Senator Jenner Mr. Chairman, I respectfully [Tr. 185] request that the witness be ordered and directed to answer the question.

"Senator Hennings. The witness is so directed.

"Mr. Shelton. I stand on the statement that I have made.

"Mr. Sourwine. You mean you refuse to answer the question?

"Mr. Shelton. That's right; for the same reason.

"Mr. Sourwine. Because of your claim of privilege under the first amendment and your challenge to the committee's jurisdiction?

"Mr. Shelton. That's right.

"Mr. Sourwine. Are you contending that you wish to assert in any way your privilege under the fifth amendment to refuse to answer questions which involve testifying against yourself?

"Mr. Shelton. No; I do not.

"Mr. Sourwine. I am not suggesting that you do so.

"Senator Hennings. You are standing solely upon the first amendment?

"Mr. Shelton. Yes.

"Mr. Sourwine. Don't you know, sir, that the [Tr. 186] Communist Party is an international conspiracy; that it is not just another political party?

"Mr. Shelton. I wish once again to stand on the statement and the reasons and things that were outlined in the statement.

"Mr. Sourwine. You mean you refuse to answer that question on the same grounds?

"Senator Jenner. I respectfully request that the witness be directed to answer the question.

"Senator Hennings. The witness is so directed.

"Mr. Shelton. I stand on the statement I made.

"Mr. Sourwine. Are you aware that the Congress of the United States and the courts of the United States have concurred in finding that Communism is an international conspiracy and the Communist Party is a part of that conspiracy?

(The witness consulted with counsel.)

"Mr. Shelton. In addition to standing on my statement, I believe that this question is one that would require a lawyer to answer. I am a newspaperman; I am not a lawyer.

"Mr. Sourwine. Sir, you would not have to be a lawyer to answer that question regardless of what counsel told you; it went only to your own knowledge. [Tr. 187] Newspaperman as informed laymen are frequently aware of other things in other fields, even specialized fields. Either you are not aware of those findings by the Congress or the courts, or you are not.

"We are simply establishing that fact, are you aware of those findings by the United States Congress or the Courts of the United States that the Communist conspiracy is a worldwide conspiracy and the Communist Party is a part of that conspiracy?"

(Witness consulted with counsel.)

"Senator Hennings. The Chair might say to the witness the witness either knows or does not know. He may make no answer if he desires, or he may say he does not know or he may state that he does know, to put it another way.

"Mr. Shelton. I have so read, so heard. However, I offer no opinion.

"Mr. Sourwine. The committee does not require you to be a conformist. We simply wanted to know if you know. Did you, sir, personally write your statement delivered here this morning?"

"Mr. Shelton. Yes.

[Tr. 188] "Mr. Sourwine. Did you have any help in the composition or the writing of this statement?"

"Mr. Shelton. I was advised by counsel.

"Mr. Sourwine. Did you consult in the writing of it with any other person than counsel?"

"Mr. Shelton. Is that question pertinent to the scope of the inquiry?"

"Mr. Sourwine. I will ask this question if the Chair permits. I will make it a more direct question. I was dividing it into two parts. Did you consult in connection with your statement or seek or receive advice in the writing of it from any person known to you to be a Communist?"

"Mr. Fraenkel. Repeat the question. I did not catch the last one.

"Mr. Sourwine. Read the question.

(Question read.)

"Mr. Shelton. The answer is 'No.'

"Mr. Sourwine. Do you know your present counsel to be a communist?"

"Mr. Shelton. I think that is a bit of a—I don't know what the ethics of the law profession are about this but it would seem to me that you are impugning [Tr. 189] the respectability; you are impugning the reputation of my counsel by this question.

"Mr. Sourwine. This question goes to the credibility of the witness in connection with the next question.

"Mr. Fraenkel. I would resent the question very seriously.

"Senator Hennings. You what?

"Mr. Fraenkel. I resent that question. The witness has already said—

"Senator Hennings. Have you any further grounds as to the reason why you apparently may object to the question?

"Counsel resenting a question is scarcely an objection under our procedures.

"Mr. Fraenkel. The witness has stated he does not consider the question pertinent, nor do I. I would advise him, as his lawyer, that he is not obliged to answer such a question.

"Senator Hennings. Then you are advising him not to answer on the ground that the question is lacking in relevancy or pertinency?

"Mr. Fraenkel. That is right.

[Tr. 190] "Senator Hennings. The Chair might observe, sir, that it would seem to me rather difficult for you to determine as counsel or for this witness to determine what is relevant or what is pertinent to the subject matter of the entire inquiry.

"Mr. Fraenkel. The Courts will have to determine that if the matter is put to that issue, sir.

"Senator Hennings. Then I take it Mr. Shelton does not see fit to answer that question.

(Witness consulted with counsel.)

"Mr. Sourwine. He has not refused.

"Mr. Shelton. To be perfectly frank, I have had no reason to believe that my counsel is a member of the Communist Party. I think his standing and reputa-

tion as one of the country's leading constitutional lawyers is undisputed.

"Mr. Sourwine. I made no challenge to the counsel's standing or reputation nor to his legal ability. The question simply was whether you knew him to be a member of the Communist Party. Is your answer 'No,' you do not?"

"Mr. Shelton. Nothing has led me to believe that he is.

[Tr. 191] "Senator Hennings. Then will you be good enough to be responsive to the question, Mr. Shelton? You either do know that he is or you do not know whether he is or indeed you know that he is not.

"Mr. Shelton. I do not know whether he is or is not.

"Mr. Sourwine. I have no further questions.

"Mr. Fraenkel. Has no reason to believe.

"Mr. Shelton. I have no reason to believe that he is.

"Mr. Mandel. Were you a member of the Communist Party or a Communist Youth Organization prior to your employment in the New York Times?"

"Mr. Shelton. I stand on my statement.

"Mr. Mandel. Did you obtain employment——

"Senator Jenner. Wait just a minute.

"Mr. Chairman, I respectfully request that the witness be ordered and directed to answer that question.

"Senator Hennings. The witness has refused to answer that question.

"Mr. Shelton. On the grounds set forth in my statement.

"Senator Hennings. On the grounds set forth; that is [Tr. 192] to say the protection afforded the witness according to his understanding of the first amendment and also the jurisdiction of the committee.

"Mr. Shelton. Yes.

"Senator Hennings. The witness is ordered and directed to answer the question.

"Mr. Shelton. I repeat that I refuse to answer the question on the grounds set forth in my statement.

"Senator Hennings. Very well.

"Mr. Mandel. Did you obtain employment with the New York Times with the aid of any Communist connections?

(Witness consulted with counsel.)

"Mr. Shelton. The answer is 'No.'

"Mr. Mandel. Do you know Matilda Landsman?

"Mr. Shelton. I stand on the——

(Witness consulted with counsel.)

"Mr. Shelton. I refuse to answer that on the grounds stated in my statement, the question being a violation of my rights under the first amendment.

"Senator Jenner. Wait just a minute. Let's keep the record straight. Mr. Chairman, I request the witness be ordered and directed to answer that question.

[Tr. 193] "Senator Hennings. The witness is ordered and directed to answer the question.

"Mr. Shelton. I stand on my statement.

"Senator Hennings. The witness refuses to answer upon the grounds stated heretofore, that is his protection under the first amendment and his challenge to the jurisdiction of this subcommittee.

"Mr. Mandel. Do you know Mathilda Landsman as a fellow member of a Communist cell at the New York Times?

"Mr. Shelton. I stand on my statement.

"Senator Jenner. I request, Mr. Chairman, that the witness be ordered and directed to answer.

"Senator Hennings. The witness is again ordered and directed to answer the question.

"Mr. Shelton. Once again I stand on my statement.

"Mr. Sourwine. I have one final question. In the preparation of the statement which you read here today, did you consult with or seek advice from or receive advice from any person other than your counsel?

(Witness consulted with counsel.)

"Mr. Shelton. A personal friend was asked for an opinion. He in no way had anything to do with [Tr. 194] drawing up the statement.

"Mr. Sourwine. Who is that?

Mr. Fraenkel. I think this is going pretty far, Senator. I think that the witness should not be required to answer that question.

"Mr. Shelton. I accept full responsibility for what is in that statement as being my ideas and with the quotations there that I also endorse from Professor Meiklejohn and from Adolph S. Ochs.

"Mr. Sourwine. I would like to have an answer.

"Senator Hennings. The witness is ordered and directed to answer the question.

"Mr. Shelton. Would you repeat the question?

"Mr. Sourwine. Yes. Who was this person whom you consulted with other than your counsel?

(Witness consulted with counsel.)

"Mr. Shelton. I believe this question is beyond the scope of the committee. And I therefore refuse to answer.

"Senator Hennings. The witness having been ordered and directed to answer the question refuses to answer the question on the grounds that this question is beyond the scope of this subcommittee's inquiry. Do I [Tr. 195] state your grounds accurately, sir?

"Mr. Shelton. That's right.

"Mr. Fraenkel. May I point out, the witness having already stated—

"Senator Jenner. Listen, Mr. Chairman, counsel is here as a privilege not as a right.

"Mr. Fraenkel. I appreciate that.

"Senator Jenner. I resent the counsel making voluntary statements. Of course, the witness is permitted to seek advice of counsel which is permissible in this committee.

"Senator Hennings. The Senator has properly

stated the functions and limitations of counsel. Counsel, I am sure appreciates it.

"Mr. Fraenkel. I appreciate that. But this being Executive Session I thought that counsel has greater freedom than in public session.

"Senator Hennings. We try to be reasonable with counsel and we try to give them latitude but you can appreciate that statements and observations by counsel do not serve any useful purpose in this inquiry, burden the record, and are not in accord with the general policy and methods of operating our committee.

[Tr. 196] "Mr. Sourwine. Sir, as a technical matter, I believe that the witness' statement that he believed the last question to be beyond the competence of the committee or whatever he did state, in the nature of an objection, I am a little afraid that the record does not show that after the raising of that objection the witness was ordered to answer the question.

"Senator Hennings. In any event, the witness will again be ordered and directed to answer the question.

"Mr. Shelton. I respectfully decline to answer the question on the grounds that it is beyond the scope of this committee's inquiry.

"Senator Hennings. Very well.

"Mr. Sourwine. I have no more questions, sir."

The Witness: I finished the Executive Session. Do you want me to continue?

The Court: No, we will give the reporter a few minutes at this time and bear in mind, if you will please, that the reporter is having some difficulty in the rapidity.

The Witness: I shall go more slowly. Sorry.

Mr. Hitz: I will furnish her a copy to go by when she has to transcribe it. How long will the [Tr. 197] recess be?

The Court: About five minutes.

(A brief recess was taken.)

The Court: Mr. Sourwine will resume the stand.

By Mr. Hitz:

Q. Mr. Sourwine, do you know what caused Mr. Robert Shelton to be recalled for appearance on December 7, 1956 in open sessions, in Washington?

A. Yes, sir.

Q. What was the reason for that?

Mr. Rauh: One moment, please. Is this something that the Chairman—he is now saying what the Chairman told him? Mr. Sourwine said before that the Chairman made these decisions on who came. If it is something that the Chairman of the Committee told him, I think we should have the Chairman of the committee to testify to it.

Mr. Hitz: I will particularize my question:

The Court: All right.

By Mr. Hitz:

Q. In view of the objection. Mr. Sourwine, did you have any discussion with the Chairman of the Committee with respect to recalling Mr. Robert Shelton for such an appearance?

[Tr. 198] A. Specifically with regard to Mr. Shelton—no, sir.

Q. With regard to the recall of him or others?

A. Yes, sir.

Q. In other words, did your discussion concern a group among which was Shelton, is that correct?

A. Yes, sir.

Q. And Robert Shelton?

A. Yes, sir.

Q. Will you tell us what your discussion with the Chairman was in that regard?

Mr. Rauh: Object on the grounds previously stated, that the questions, why the Chairman said to recall him, is up to the Chairman, who should be here.

Mr. Hitz: This is information he imparted leading to the recall.

The Court: The objection will be overruled. The witness may testify.

The Witness: I presented the Chairman with a list of

persons who had testified in Executive Session, whom I recommended be recalled for public session, because in my judgment they were people who had information that would be valuable to the committee. Robert Shelton's name was on the list. The Chairman approved the [Tr. 199] entire list as recommended.

By Mr. Hitz:

Q. Did you discuss any reasons with respect to any of the individuals on that list with the Chairman?

A. No, sir, I did not.

Q. And how was his presence secured?

A. Notice was given to his counsel.

Q. I see. Now, Mr. Sourwine, will you turn to a page in report No. 1934 which is the attachment to Government's exhibit 10, turn to the page after you left off reading from the Executive Session.

A. Yes, sir.

Q. And as an annex to this document is there there reprinted the testimony of Mr. Shelton on January 6, 1956?

A. Yes, sir.

Q. Now, Mr. Sourwine, about seven lines from the top on page 12 there are some asterisks. Will you please—

Mr. Hitz: Could I have government exhibit 8?

The Clerk: Yes.

By Mr. Hitz:

Q. Take from me government exhibit 8 which is part 17 of "Strategy and Tactics" and look at the contents and tell me does the name "Shelton" appear there, [Tr. 200] and then refer to where it gives a page number.

A. It does appear in the index showing testimony of Robert Shelton, page 1721.

Q. Will you turn with us to 1721.

Mr. Hitz: I think your Honor has a working copy of this.

The Court: Yes.

By Mr. Hitz:

Q. I would like to ask you, Mr. Sourwine, if the asterisks that appear on that page 12 of the report of Citation of

Shelton, being Senate Report 1934, are to indicate the omission of the opening statement and colloquy between members of the Committee immediately prior to the swearing of Mr. Shelton?

Mr. Rauh: Objection, your Honor. I do not see how he could testify what was intended by the asterisks.

Mr. Hitz: The word "intend" is not in my question at all.

Mr. Rauh: Let us have the statement read back. Maybe I misunderstood.

Mr. Hitz: I do not think——

The Court: All right.

[Tr. 201] (Question read.)

Mr. Rauh: I do not think he can testify to that unless he says he made up the document which the asterisks are part of. How could he tell why somebody else put asterisks there?

The Court: Well, we can ascertain from the witness if he was there.

Mr. Hitz: Thank you.

Mr. Rauh, I will take it up a little more in detail.

By Mr. Hitz:

Q. Will you look at pages 1721 to the end of the testimony of Mr. Shelton, and tell me, have you ever read that in this print, being government exhibit—sorry, government exhibit 8, part 17 of Strategy and Tactics? Have you ever read that?

A. May I ask the Court for an instruction? I do not mean to quibble with counsel.

Mr. Hitz: I will withdraw the question.

The Witness: I have this problem, what appears in the hearing, which is government exhibit 8, is not precisely what appears beginning on page 12 of this report No. 1934.

[Tr. 202] By Mr. Hitz:

Q. I did not ask you that. I merely asked you if you had read this part of 17, which purports to be the entire testimony of Mr. Shelton. Have you ever read it?

A. Yes, sir.

Q. I am asking you next is it accurate to the best of your recollection of what actually took place?

A. Yes, sir.

Q. Now, beginning—turning to page 1717 of government exhibit 8.

A. Yes, sir.

Q. Is that the commencement of the hearing at which Mr. Shelton immediately thereafter appeared on January 6, 1956?

A. Yes, sir.

Q. Does that include the opening statement of the chairman on about the 7th line on page 1717?

A. Yes, sir.

Q. Did the statements and colloquy that appear on pages 1718, 1719, 1930 preceding the swearing of Mr. Shelton on page 1729 occur—did that take place?

A. You said page 1729.

Q. I did not.

A. I am sorry.

[Tr. 203] Q. I said 1717 to the swearing of Mr. Shelton on 1721, did that take place?

A. Yes, sir.

Q. Is it accurately reported so far as your recollection serves you?

A. Yes, sir.

Q. And did it occur in the sequence that is represented here by this print?

A. Yes, sir.

Q. I think now with that preliminary, Mr. Sourwine can answer the question that is pending, namely, do the asterisks indicate the omission of that material. I put the question to him.

Mr. Rauh: I object for the reasons stated.

The Court: The objection will be overruled. But the Court would like to have the clarification which the Court does not feel is presently before the Court.

Mr. Hitz: Yes, your Honor.

The Court: As the Court recalls, your question was

"immediately thereafter." The Court is concerned with whether the defendant was present.

Mr. Hitz: I see. All right, sir.

[Tr. 204] By Mr. Hitz:

Q. Was the defendant present at the time of the statement and colloquy immediately preceding his being sworn as indicated on 1721?

A. Yes, sir.

Q. Now, will you answer this question: Do the asterisks on page 12 of the report represent that omitted matter which remains in the running account of what did take place?

A. Yes, sir.

Q. Mr. Sourwine, would you be good enough to read, beginning on page 1717 of government exhibit 8?

A. Yes, sir.

Q. Read the entire page, and from there on until I ask you to stop.

A. Yes, sir. (Reading:)

"Communist Activity in New York.

"Friday, January 6, 1956. United States Senate Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on Judiciary, Washington, D. C.

The subcommittee met pursuant to notice at 10:10 a.m. in Room 318 Senate Office Building. [Tr. 205] Senator James O. Eastland (chairman of the subcommittee) presiding.

"Present: Senators Eastland, Johnston of South Carolina, Hennings, McClellan, Jenner, Watkins and Welker.

"Also present: J. G. Sourwine, Chief Counsel and Benjamin Mandel, research director."

That is a misspelling.

Q. Let me interrupt a minute. How many members on the entire subcommittee?

A. Nine.

Q. Will you continue, please, sir?

A. Yes.

The Chairman. The committee will come to order. I have a telegram that I am going to read into the record. This telegram is addressed to the Chairman:

The Long Island Daily Press is in accord with your committee in its efforts to expose Communist infiltration wherever found and certainly welcomes any revelations bearing upon the local scene. Far from being upset because of the revelation that a communist directed clique operated in the 1930's among the employees of the press, we are grateful for the authoritative corroboration of the [Tr. 206-207] stand we took at the time, both in the columns of our paper and in appearances before public bodies. We took our fight to the people during the period of the popular front when the Communists and fellow travelers were riding high, and we did not shrink from firing all those who were lending themselves to the Communist cause.

Unfortunately there have been distortions of the news emanating from your committee at our expense. These distortions have in no way been the fault of your committee but have falsely represented that you are investigating the press. As the record shows, the Press fought the Communist danger to a standstill in our newspaper and in our community at a time when it was hardly fashionable to do so. If any Communist or fellow traveler in our midst was overlooked, we certainly would be grateful to have him uncovered.

We do not believe that your committee is "after" our newspaper. May we ask you, therefore, to cooperate in counteracting a distortion by stating your own knowledge as to the role the Press has played in dealing with Communist infiltration.

Signed EDWARD GOTTLIEB,
Managing Editor, Long Island Press,
Jamaica, N.Y.

[Tr. 208] To which I would make this statement. This will be my reply. I also sent a telegram incorporating what I state here.

The committee is investigating all of the testimony and information given to it by all witnesses and that includes testimony of Clayton Knowles, to the effect that he was a member of a Communist unit while employed by the Long Island Press during 1937 and 1939.

The committee is not investigating the Long Island Press or any other newspaper. We are aware of the fact that the Long Island Press was alert to the danger of the Communist infiltration from a very early date and was aggressive and effective in combating this danger in its own organization.

What we are interested in, if we can learn it, is the story of the members—of the past and present activities of the persons named by Mr. Knowles as members of the communist cell to which he belonged. None of these persons, so far as we can ascertain, has been employed by the Long Island Press for many years.

Senator Hennings. In connection with, Mr. Chairman, the statement the chairman has just read, I was unable to be at the hearing yesterday afternoon because of the meeting of the Democratic Policy Committee a great [Tr. 209] part of the afternoon.

On Monday I expressed some misgivings and doubts about the calling of certain witnesses who had been, for a short time or, indeed even for some considerable time, members of the Communist Party reaching back into a period of fifteen or twenty years ago. I am sure that we have all had some concern about, for example, the calling of Mr. Knowles the other day. I did not know that Mr. Knowles was going to be a witness until shortly before he appeared to testify and knew nothing of the nature of his testimony. He didn't appear before any executive session where I happened to be present. When did he appear, Mr. Sourwine?

The Chairman. He appeared last fall at an executive session.

Mr. Sourwine. On October 6.

The Chairman. At an executive session at which I presided.

Senator Hennings. I came on the committee last January, so that was before I was a member of the subcommittee, was it not? You mean this past October? Yes, that was during some other hearings—hearings of our Constitutional Rights Committee.

The thing that I think perhaps this committee [Tr. 210] might want to give some attention to—and counsel may be able to enlighten us, since we have no list of prospective witnesses, nor has any offer to prove as to what their testimony is likely to be given to this subcommittee—is whether in calling some witnesses, and I do not know whether or not there are any witnesses who may be in what seemed to be Mr. Knowles' category or not—we can be sure that we do not do an injustice and cause undue embarrassment and humiliation to a man who has completely rehabilitated himself, if he has no new or additional information to give this committee.

I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication. But I do believe that in certain cases, if such are to be heard, and if there are witnesses to be heard today or at any other time, in the interests of justice, because we have a duty to protect witnesses as well as to protect the purpose of this inquiry, that the subcommittee go into executive session so that we may determine whether or not the testimony of certain [Tr. 211] witnesses will be of substantial value to this committee and to the enlightenment of the general public.

Mr. Knowles did not appear in New York and I learned for the first time when he appeared on Monday that he was to be a witness.

Now, I realize that we have a problem of not calling some witnesses and perhaps calling others in the same

category, but I would like to say—and I am sure that the other members of this subcommittee are equally mindful to the same degree—that simply to call a witness for the purpose of getting cumulative testimony, and particularly where his activities have been remote in time, and even more especially where they have been of the very short duration and where he has rehabilitated himself, as Mr. Knowles did, by going to the FBI, by going to his employer and making a full and complete disclosure—I just wonder what useful purpose can be served in some instances in calling such witnesses.

What I am saying, I say by way of first suggesting that in such cases I do hope that counsel will consult with the committee in executive session if counsel has any doubt as to these points, because the [Tr. 212] law does recognize even in the case of one having been convicted of a felony, that if that is remote in time and the courts vary as to the number of years which may be said to be remote in point of time—but that the defendant or other witness may not be interrogated as to the previous convictions if they are so remote and if the witness has thereafter led a blameless and upright life. And I do think in the interest of justice and in the interests of preserving the integrity and the high standing of this committee, we should be particularly cautious and aware of the possibility of unnecessarily calling one before us who may have nothing to add to the general subject matter of our inquiry and who may be seriously damaged in his own personal and professional life.

I feel that that statement should be made at this time and in making it I do not reflect upon the judgment of anybody, either the witnesses we are to hear hereafter or those that we have heard before.

Today, for example, we have no list of witnesses who are to appear. I assume that most of them are witnesses, Mr. Sourwine, who appeared in the Executive session hearing.

Mr. Sourwine. Yes, sir.

Senator Hennings. All of them? All of them, are they?

[Tr. 213] Mr. Sourwine. Yes, sir. That is right.

Senator Hennings. But I would like to suggest to the Chairman that occasionally we do have an executive session of the committee so that counsel may make an offer of proof as we do in court, to determine some of these close cases.

The Chairman. Now, let the chairman state right there that the chairman was not at the executive sessions in New York City. The Senator from Missouri conducted those sessions. And after the conclusion, I tried to reach him for a number of days and was informed by his office that he could not be reached.

So, I discussed the testimony and set these hearings and I think I took the right position and the only position that I could take.

Now, Mr. Knowles, I think, made a very fine witness. He has given the committee information that I think is invaluable. Some of it leads to people who are in a State government.

Senator Hennings. By the same token, of course, I was in the State of Missouri after the hearings, and I do not reflect upon the chairman in any sense when I make [Tr. 214] that statement. But I also tried to reach the chairman the week preceding Christmas week, and it just so happened that we are at times, all of us, difficult to reach.

The Chairman. I am not blaming the Senator from Missouri. I was in my home in bed the week before Christmas.

Senator Hennings. Yes. I understood that the Senator had not been well.

Now, I have three other conflicting committee meetings this morning. I shall be here, I would like to announce, Mr. Chairman, as much and as often as I can be here today. The Antitrust Subcommittee is meeting in executive session at this time, the Juvenile Delinquency Subcommittee, and this committee.

I just have a note that the Antimonopoly Committee

is calling, and they want to approve the budget of that committee. So, if I may be excused a few moments, I will return when I can.

The Chairman. Yes, sir.

Senator Hennings. All I wanted to say, in summing up, Mr. Chairman, is that, I believe, we should continue to proceed with all caution and all consideration.

[Tr. 215] The Chairman. I certainly agree with that. I don't think that the Senator from Missouri will say that it has ever been the chairman's position to try to humiliate or hurt anyone. We are attempting to conduct these hearings and elicit all the facts and I certainly think that I would have been derelict in my duty had Mr. Knowles not been called, and I am confident that future hearings will vindicate the information he has given us, the leads he has given us.

Call your witness.

Mr. Hitz: Just a moment, sir.

I would like to ask you to turn to page 1587 of this same document and then I will ask you some questions.

A. Yes, sir.

By Mr. Hitz:

Q. Does what takes place commencing on page 1587 comprise the commencement of these hearings into infiltration, into media of Communications and the Press, for——

A. No.

Q. —for this year.

A. Yes.

Q. Would be then, be the resumption of——

A. That is for the year named here, yes.

Q. 1956.

[Tr. 216] A. Yes sir.

Q. Would that be the resumption of the hearings after Mr. Burdett's testimony and what it led to.

A. Yes, sir. If you take resumption to mean the same thing as continuation of the same investigation.

This was a new series of hearings in the same line of investigation, into this infiltration of mass Communications media.

Q. Now, does what the Chairman states on page 1587, Oh, strike that.

Is the Chairman's statement on page 1587 his opening statement and colloquy thereafter at the commencement of this resumed set of hearings?

A. Yes.

Q. At this time was Mr. Shelton present?

A. No, sir.

Mr. Hitz: Your Honor, I would like Mr. Sourwine to read the two pages here of opening statement and colloquy. They are 1587 and 1588. I just pointed out that Mr. Shelton was not there, so that we do not charge him with having personal direct knowledge as an observer here at what took place at this opening. However, it does relate to this trial in that it is important on the [Tr. 217] matter of legislative purpose, and actual pertinency and statement of subject matter.

With that statement with regard to it, I offer it in evidence and would like it to be introduced by Mr. Sourwine, and permit him to read it, may I do so?

The Court: You may.

Mr. Hitz: Will you read what the Chairman has to say on page 1587 and continue until I ask you to stop.

The Witness: Yes, sir. (Reading:)

The Chairman. Come to order.

The hearings we are about to open stem from sessions of this subcommittee held on June 28 to 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster.

Having been drawn into the Communist party in 1937 and having left that organization in the early 1940's, Mr. Burdett rendered a patriotic service by disclosing to the subcommittee the names of men and women whom he knew as members of the Communist party.

In conformance with its mandate from the United

States Senate and from the American people, the subcommittee was in duty bound to pursue every lead [Tr. 218] which developed out of the Burdett testimony. In justice to those named it could not do otherwise than give these individuals an opportunity to affirm or deny allegations made. Some have explained fully and frankly the nature of their associations. Others have invoked the protection of the fifth amendment in refusing to answer questions in regard to their communist affiliations.

The subcommittee could not be unmindful of the fact that among the persons involved in this investigation have been many who were or are members of the press, and that the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. These facts did not in any way decrease the importance of carrying onward the investigation with diligence, care and devotion to duty. The present hearings open up a subsequent chapter to the Burdett testimony of June 28 and 29, 1955.

Who is your first witness.

Mr. Sourwine. James Glaser.

The Chairman. Mr. Glaser.

[Tr. 219] Senator Hennings. Mr. Chairman.

The Chairman. Yes, sir. The Senator from Missouri.

Senator Hennings. I am very sorry that I was detained for a few minutes and did not hear all of the chairman's statement with respect to the hearings about to get under way. I take it that the chairman was advised, as other members of the committee have been, that at the request of the committee, I went to New York and presided for two days over the executive hearings.

The Chairman. Yes.

Senator Hennings. On the same subject matter. I do believe it is very important at the outset for us to

make it abundantly clear, if that is the purpose of counsel, and if it is the purpose of this committee, that this is not in any sense an attack upon the free press of the United States.

The Chairman. Why, certainly, that is true.

Senator Hennings. And I think, too, that it should be clear that the best evidence of any subversion or infiltration into any news-dispensing agency or opinion-forming journal is certainly the product itself.

[Tr. 220] The Chairman. That is correct.

Senator Hennings. But I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings—that it be generally known and understood that this is not an attack upon anyone newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.

And I do think that at some later time, perhaps, it might be appropriate for executives of some of the newspapers under inquiry, whose employees are under inquiry, to be called and to testify and for them to show, if they can show, that the end product, the newspaper itself has not been influenced by these efforts.

The Chairman. The Chair thinks that is a very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety.

We are not singling out any newspaper and not [Tr. 221] investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any newspaper has been singled out.

Senator Hennings. Thank you, Mr. Chairman.

Senator Watkins. I would like to say I agree with Senator Hennings' statement, Mr. Chairman."

Mr. Hitz: Thank you, Mr. Sourwine.

By Mr. Hitz:

Q. Now, would you turn back to where we were reading from the day's testimony of January 6, 1956.

A. Yes.

Q. Page 1721, I believe. Am I correct in that?

A. I think I had stopped at the point where Mr. Shelton was about to be sworn. That would be on page 1720. I may be in error.

Q. You are correct.

Will you resume the reading with that omission, please?

A. Yes, sir. (Reading:)

" Mr. Sourwine. Mr. Shelton.

The Chairman. Will you hold your hand up.

[Tr. 222] Mr. Shelton. Before I am sworn in, Mr. Chairman, I would like to raise an objection that might have some bearing as to whether or not I am sworn in.

I wish to challenge the jurisdiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me.

Senator Jenner. I cannot hear you. Will you speak a little closer to the mike.

Mr. Shelton. If I may repeat this:

I challenge the jurisdiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me that could possibly assist it in any legislative purpose.

To question me further in Washington might subject me to prosecution in violation of my right to be tried in the community where I work and live.

Furthermore, I fail to see why I am involved in this hearing which the Chairman said on Wednesday [Tr. 223] stems from the Burdett testimony. There

was no reference to me in the Burdett testimony nor in the testimony of Mr. Clayton Knowles.

Mr. Sourwine. Mr. Chairman, what the witness has said boils down to an assertion that because he has refused to answer certain questions before the committee in executive session, the committee has lost jurisdiction to ask him the same or other questions in public session.

I think that is absurd, and I respectfully ask that the objection be overruled and the witness be sworn.

The Chairman. Yes, the objection is overruled.

Will you hold your hand up.

Do you solemnly swear the testimony you are about to give the Senate Internal Security Subcommittee is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Shelton. I do.

Mr. Sourwine. Would you give the reporter your full name.

Mr. Shelton. Robert Shelton.

Mr. Sourwine. You have a middle initial, Mr. Shelton?

[Tr. 224] Mr. Shelton. No, I don't.

Mr. Sourwine. And your address, sir?

Mr. Shelton. 191 Waverly Place, New York 14, New York.

Mr. Sourwine. You are here represented by counsel?

Mr. Shelton. Yes.

Mr. Sourwine. Would you introduce counsel, please.

Mr. Shelton. Osmond K. Fraenkel, F-r-a-e-n-k-e-l.

Mr. Sourwine. And the New York City address?

Mr. Shelton. 120 Broadway.

Mr. Sourwine. Mr. Shelton, what is your business or profession?

Mr. Shelton. I am a copy editor.

Mr. Sourwine. Where are you employed.

Mr. Shelton. The New York Times.

Mr. Sourwine. How long have you been employed there?

Mr. Shelton. It will be five years in February.

Mr. Sourwine. Have you been employed as a copy editor all of that time?

Mr. Shelton. No; for about the past year and a half I have been copy editor.

[Tr. 225] Mr. Sourwine. What did you do before?

Mr. Shelton. I was a news clerk.

Mr. Sourwine. What does that mean? What is a news clerk, sir?

Mr. Shelton. Well, a news clerk is one—an assistant or an apprentice, I worked on the city desk.

Mr. Sourwine. Did you ever write obituaries?

Mr. Shelton. If this is not an investigation into the press, Mr. Sourwine, I don't see the pertinency of the question to the scope of the investigation.

Mr. Sourwine. We are attempting to determine what your employment is, sir. Did you ever write obituaries?

Mr. Shelton. I am a copy editor, sir, in the news department of the New York Times.

Mr. Sourwine. Did you ever write obituaries?

Mr. Shelton. Write obituaries?

Mr. Sourwine. Yes, sir.

Mr. Shelton. That is not my job, sir.

Mr. Sourwine. Did you ever write obituaries?

[Tr. 226] Mr. Shelton. I may at one time have re-written an obituary, but my job is that of copy editor.

Mr. Sourwine. Did you write the obituary for Richard H. Krebs, Jan Valtin?

Mr. Shelton. I do not write obituaries. The answer to that is 'No, sir.'

Mr. Sourwine. Right.

Mr. Shelton. I am raising the question since this is not a question of the investigation of the press, why you are asking why I have written—

Mr. Sourwine. Are you, sir, a member of the Communist Party, U.S.A?

Mr. Hitz: Just a moment, please, sir.

Your Honor, that is count 1.

Will you resume reading without omission, please.

The Witness: Yes.

Mr. Sourwine. Are you, sir, a member of the Communist Party, U.S.A?

Mr. Shelton. In reply to that, sir, I would like to make a brief statement that answers—that deals with the question.

[Tr. 227] No one who knows me would doubt my loyalty to the Government of the United States; because I am a loyal American, I must as a matter of principle, challenge questions into my political beliefs and associations as a violation of my rights under the first amendment to the Constitution.

Mr. Sourwine. Do you, sir, consider membership in the Communist Party a matter of political belief?

Mr. Shelton. If I may be allowed, sir, to continue the statement, I have not raised my objections.

Mr. Sourwine. Would you answer that question and then you may—

Senator Jenner. Let the record show consultation.

(Consultation between witness and his counsel.)

Mr. Shelton. I object to the question on the very same grounds.

Mr. Sourwine. You mean you are declining to answer that question?

Mr. Shelton. That is correct. I decline [Tr. 228] on the grounds of the first amendment and challenge to the jurisdiction of the committee.

The Chairman. Now, I overrule the objection.

Mr. Shelton. And I would like to continue with my statement because I have not gone into my reasons for it.

Senator Jenner. Mr. Chairman, I move that you order and direct the witness to answer that question.

The Chairman. Yes, the first amendment does not give you legal right to refuse to answer questions. Now, I order and direct you to answer the question.

Mr. Shelton. I am answering the question, sir, in the statement, if I may continue to read it. I am not on trial here, sir. But I think that because of the nature of this hearing my integrity and possibly my

career are at stake. If I may be allowed to continue to state my—

The Chairman. All right, I am going to permit you to do it.

Mr. Shelton. Thank you, sir.

Mr. Hitz: Just a moment, now.

[Tr. 229] Your Honor, he there continues to read a statement, which an examination and comparison with the statement made and read in the executive session is the same, and for that reason I am going to ask Mr. Sourwine to discontinue reading at that point, to omit what is contained on the next page which is 1723 and that portion of page 1724, all of which precedes the statement of the Chairman, that is, the words "The Chairman"—approximately 12 lines from the top, and resume reading at the point, omitting thereby only so much of the statement that was not only read to the committee, but read to this court and to our record a few moments ago from the executive Session.

Mr. Rauh: Your Honor please, Mr. Hitz is in quite remarkable error. The statement read this morning out of the executive session is wholly different from the statement which Mr. Sourwine was not asked to omit.

Indeed the language which he now suggests be omitted includes this sentence.

"These hearings as a victim of accident." The whole case is rested on the fact that he is involved in these hearings as a victim of accident, and that is the sentence he suggests that he leave out.

[Tr. 230] Mr. Hitz: If his statement that what I did was remarkable, is an objection, I will ask Mr. Sourwine to omit nothing but read everything. Will you do that?

The Court: All right.

The Witness. (Reading:)

Mr. Shelton. Thank you, sir. That amendment says Congress shall make no law—abridging the freedom of speech or of the press, or the right of the people peaceably to assemble . . .

Several weeks ago Prof. Alexander Meiklejohn testified

before the Senate Subcommittee on Constitutional Liberties. He said in part:

• • • no subordinate agency of the Government has authority to ask, under the compulsion to answer, what a citizen's political commitments are. The question "Are you a Republican?" or "Are you a Communist?" when accompanied by the threat of harmful or degrading consequences, if an answer is refused, or if the answer is this rather than that, is an intolerable invasion of the "reserved powers" of the governing people.

I hold with Professor Meiklejohn on both points. As a matter of principle I decline to answer the question [Tr. 231] because it invades my rights under the first amendment. I would decline similarly if asked whether I was or had ever been a Democrat, Republican, Socialist, Jew, Catholic, or Protestant, vegetarian, prohibitionist, or sun worshiper.

The question also threatens freedom of the press as guaranteed by the first amendment. I believe no other governmental body in the free world would call a newspaperman and demand to know his political beliefs and associations. However, unknowingly or unwittingly, gentlemen, in the quest for internal security, you are threatening longstanding and hard-won American liberties. The Supreme Court has held that—

• • • the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate • • •

A body is the sum of its organs, a machine the sum of its parts. An attack on the smallest component of a body or machine is an attack on the whole. An invasion of my individual rights is an invasion of the rights of the paper that employs me and an invasion of [Tr. 232] the rights of the paper that employs me and an invasion of the rights of the newspaper profession as a whole.

This subcommittee is nudging the end of my copy pencil, it is peeking over my shoulder as I work. This subcommittee is engendering the fear that soon it will be looking into newsrooms all over the country.

If, as a result of my being called here, I am put under mental pressure to change one word or one sentence in material that I edit, an abridgment of freedom of the press will have taken place. Demanding to know what is going on in the mind of a newspaperman without inhibiting a free press is impossible. Your question acts as a form of "prior restraint" on publishing, telling newspaper executives who should or who should not be on their staffs.

A journalist's credo, I wholeheartedly support is "to give the news impartially, without fear or favor, regardless of any party, sect or interest involved * * * But by being called before you to answer about my political beliefs and associations I am placed in fear of having my loyalty considered suspect if I do not, while freely [Tr. 233] exercising my sound conscience, answer this committee's questions. I am obliged to seek your favor to guard my personal integrity and that of the paper for which I work.

I am first involved in these hearings as a victim of accident. The subpoena first served to me was originally made out in the name of a person who does not work on my paper. A committee aide, when told that there was no such person on the Times, insisted on knowing if there was anyone with a similar name employed there. There were a few, but the only one that interested your man was the sole similar name in the news department—mine. At the executive hearings the committee counsel tried without success to link me with a certain New York newspaper. He was unable to establish any connection because I never worked for the paper under discussion. Yet I have been called back here today. It appears to be just another step in a campaign to discredit the paper for which I work.

I am not saying that I, as a newspaper man am immune from investigation. If I have committed a crime

or am alleged to have committed a crime, let a grand jury indict me, and let me stand trial on the charge. [Tr. 234] I fear no such indictment because I have committed no crime.

As Chief Justice Warren has ruled:

• • • the power to investigate must not be confused with any of the powers of law enforcement
• • • still further limitations on the power to investigate are found in the specific individual guaranties of the Bill of Rights • • •

Let me, in complete sincerity, cooperate with you by saying this: One of the greatest contributions that can be made toward the internal security of the United States would be to promote—

The Chairman. Just a moment."

Mr. Hitz: If Your Honor has in mind waiting for a break in the reading, there is one here at this time, or does your Honor care to go forward?

The Court: No, if we can get a break now, it is fine.

Mr. Hitz: There is a break in the continuity. I would like to take this opportunity of stating that I was in error when suggesting omitting reading this statement that it was the same as the one in the executive session. It is not. It compares—the comparison [Tr. 235] that I made before making my remark, I made a mistake, and I compared it with that part of government's 1694 which duplicated what we are reading. I compared it with the wrong thing. I thank Mr. Rauh for catching that.

And that we have complete continuity without any breaks in the testimony of January 6, so far.

The Court: We will recess until a quarter of two.

(At 12:35 o'clock p.m. a recess was taken until 1:45 p.m.)

[Tr. 236]

AFTERNOON SESSION

(Pursuant to recess, the hearing was resumed at 1:45 o'clock p.m.)

Thereupon JULIEN G. SOURWINE a witness, having been duly sworn, resumed his testimony further as follows:

Direct examination. (continued)

By Mr. Hitz:

Q. You were reading page 1724 of Part 17, Strategy and Tactics, being government exhibit 8 and I think we broke just before the Chairman makes a statement "Wait just a minute."

A. I believe that is right.

Q. You need the evidence copy of 8, I suppose.

A. What is the page?

Q. 1724. Will you continue to read without omission?

A. (Reading.)

"The Chairman. Wait just a minute. We are not interested in your idea of what would promote the internal security of the United States. The way to prevent your loyalty from being questioned is to freely and fully answer the questions that are asked you, sir. I overrule the objection and order you to answer the question.

[Tr. 237] Mr. Shelton. I respectfully decline to answer to—there is in the final paragraph of this sentence an additional objection.

The Chairman. You have listed the first amendment.

Mr. Shelton. There is still—

The Chairman. That is overruled.

Mr. Shelton. There is an additional objection here, sir, if I may—I have two more paragraphs and I will be through with my statement.

The Chairman. I wanted you to answer the questions. I overrule the objection.

Mr. Shelton. Furthermore, I challenge the jurisdiction of this subcommittee.

The Chairman. Wait just a minute. Answer the question.

Mr. Shelton. I refuse to answer on the grounds of the first amendment and a challenge to the jurisdiction of the committee.

The Chairman. Those are the only grounds you have?

Mr. Shelton. And the grounds set forth here in my statement, sir.

The Chairman. Set forth in your statement? Now your last two paragraphs that you mentioned are [Tr. 238] a challenge to the jurisdiction of the committee, is that right?

Mr. Shelton. Well, I believe that the challenge to the jurisdiction is implicit throughout my statement. It quotes from the Supreme Court ruling, and the whole substance of it.

The Chairman. You have two paragraphs you desire to read?

Mr. Shelton. Beg pardon?

The Chairman. You say you have two paragraphs more you desire to read?

Mr. Shelton. Yes, sir.

The Chairman. Read them.

Mr. Shelton. Let me, in complete sincerity, cooperate with you by saying this: One of the greatest contributions that can be made toward the internal security of the United States would be to promote the maintenance of a press that is free and unfettered and unafraid; a press and newspapermen that will criticize what they please and support what they please. It is a rightful role of the press to be a watchdog over government. It is not a rightful role of the press to be a watchdog over the press. Let the reader at his breakfast table be the [Tr. 239] judge of whether a paper suits him or not, and by extension, whether the men who produce that paper suits him.

On the basis of these considerations, I must respectfully arrive at the conclusion that this question is a violation of my rights guaranteed by the first amendment

in respect to freedom of speech and of the press and peaceable assembly. Furthermore, I challenge the jurisdiction of this subcommittee to ask the question.

The Chairman. Yes, sir. I overrule the objection. The question sought information as to whether you are a member of the conspiracy to destroy the Government of the United States. It is a proper subject for inquiry, and I order you to answer the question.

Mr. Shelton. I respectfully will decline to answer the question, sir, on the grounds set forth in my statement.

The Chairman. On penalty of contempt of the United States Senate, I order you and direct you to answer the question.

Repeat the question.

[Tr. 240] Mr. Sourwine. Are you, sir, a member of the Communist Party, USA?

Mr. Shelton. I respectfully decline to answer the question on the basis of the grounds set forth in my statement.

Mr. Sourwine. Do you by those grounds, sir, intend to make any claim of privilege under the fifth amendment to the Constitution?

Mr. Shelton. I do not, sir.

Mr. Sourwine. Have you ever been a member of the Communist party in the past?

Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the grounds set forth in my statement.

Mr. Sourwine. So that those grounds may be clear, I will ask again the question which I asked, the answer to which the chairman permitted you to decline. This question: Do you believe that membership in the Communist party is merely a matter of political belief?

(Consultation between witness and his counsel.)

The Chairman. Let the record show that he [Tr. 241] conferred with his counsel.

Mr. Shelton. I respectfully decline to answer that

question, sir, on the basis of the grounds set forth in my statement.

Mr. Sourwine. You have in your statement, sir, likened the Communist Party to the Democratic and Republican Parties. Do you think the Communist Party and the Democratic Party and Republican Party are all in the same category?

Mr. Shelton. I respectfully decline to answer that question, sir, on the grounds set forth in my statement.

Mr. Sourwine. In your statement, sir, you likened the Communist Party to Catholics and Jews. Do you think Catholics, Jews and Communists are all in the same category?

Mr. Shelton. (No response.)

The Chairman. Answer the question.

Mr. Shelton. I believe that I have made this clear in my statement. I wish to stand on my statement.

Senator Jenner. Order and direct him to answer the question.

The Chairman. I order and direct you to answer the question, sir.

[Tr. 242] Mr. Shelton: I respectfully decline to answer the question on the basis of the grounds set forth in my statement.

Mr. Sourwine. In your statement, sir, you likened the Communist Party to sun worshipers. Do you think sun worshipers and Communists are in the same category?

Mr. Shelton. I respectfully decline to answer the question on the grounds set forth in my statement.

Mr. Sourwine. Mr. Shelton, did you write that statement yourself without assistance?

Mr. Shelton. Yes, sir. I did. I conferred with my counsel on it, but I wrote every word in the statement with the exception of the quotes from Professor Meiklejohn, the quotes from the late Adolph S. Ochs, the quotes from the Supreme Court and a paraphrase of the late editor of the New York Times, Charles Ransom Miller.

Mr. Sourwine. Do you, Mr. Shetland, know any per-

sons who are known to you to be members of the Communist Party?

Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the [Tr. 243] grounds set forth in my statement.

Mr. Sourwine. Mr. Shelton, do you know Matilda Landsman?

Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the grounds set forth in my statement.

Mr. Sourwine. Do you, Mr. Shelton, have any knowledge respecting a Communist attempt to take over control of Typographical Union No. 6?

Mr. Shelton. If I may confer with my counsel—
Mr. Sourwine. Yes.

(The witness consults with his counsel.)

Mr. Shelton. No.

Mr. Sourwine. Did you ever discuss with Matilda Landsman the question of any Communist activity in that union?

(The witness consults with his counsel.)

Mr. Shelton. No, sir.

Mr. Sourwine. Now, for the purpose of testing the credibility of that answer, sir, I will ask you, did you ever have any conversation with Matilda Landsman?
[Tr. 244] Mr. Hitz: Excuse me. That is Count No. 2, Your Honor.

The Court: All right.

The Witness: (Reading)

Mr. Shelton. I respectfully decline to answer the question, sir, based on the grounds set forth in my statement.

The Chairman. You are ordered and directed under penalty of contempt of the United States Senate to answer that question.

Mr. Shelton. I am really amazed sir, that you mention the word "contempt." If you should attach any criminality—

The Chairman. Answer the question, sir.

Mr. Shelton (continuing)—to a difference of opinion—

The Chairman. Answer the question. You are going to be cited for contempt unless you do.

Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the grounds set forth in my statement.

Mr. Sourwine. Mr. Shelton, did you ever secure employment through Communist channels or with the [Tr. 245] assistance of persons known to you to be Communists?

(The witness consults with his counsel.)

Mr. Shelton. The answer to that, sir, is 'no.'

Mr. Sourwine. Did you, Mr. Shelton, ever assist any person known to you to be a Communist to secure employment?

Mr. Shelton. The answer to that is 'No,' sir.

Mr. Sourwine. Did you, Mr. Shelton, ever discuss with your employers the question of any Communist activity in which you engaged in the past?

Mr. Shelton. I really must challenge the pertinency of that question to the scope of the investigations.

The Chairman. I order and direct you to answer the question.

Mr. Shelton. So there will be no doubt, sir, the answer to that question is 'Yes.'

Mr. Sourwine. What did you tell them?

Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the [Tr. 246] grounds set forth in the statement.

The Chairman. Now, you are ordered and directed to answer the question.

Mr. Shelton. I respectfully decline to answer the question, sir, on the basis of the grounds set forth in my statement.

Mr. Sourwine. Was what you told your employer in that conversation about your past Communist activ-

ity, if any, the truth, the whole truth and nothing but the truth?

Mr. Shelton. That, sir, sounds to me like a question of, when did I stop beating my wife. I am single, sir.

The Chairman. Answer the question.

Mr. Shelton. Whatever I have told my employers is the truth, sir.

Mr. Sourwine. Why are you afraid to tell it here? You are under oath now. You were not then.

Mr. Shelton. It is not a question of here, sir.

Mr. Sourwine. Why won't you tell us here what you told your employer?

Mr. Shelton. It is my understanding, sir, [Tr. 247] that the first amendment is the door to America's freedom of conscience. It is just as strong and secure a door as that on the house of the chairman in Dodds-ville, Miss. It can be opened at will any time from within; it cannot be forced open with the wedges of a subpoena, with threats of contempt citation, or in any other form.

Mr. Sourwine. Assuming that all that is true, sir, which is questionable in your instance, why are you refusing to open that door before this committee?

Mr. Shelton. I believe that I have fully set forth my reasons in the statement that I have just read to the subcommittee.

Mr. Sourwine. No, sir; in answer to that question, what you have said amounts to a statement that you are refusing to tell us because you have a right to refuse to tell us. That is non sequitur. That is no reason. I am asking you, why are you availing yourself of the right you assert here to refuse to answer that question?

Mr. Shelton. May I consult with my counsel, sir?

Mr. Sourwine. Surely.

[Tr. 248] (The Witness consults with his counsel.)

Mr. Shelton. This happens to be a matter of principle, and I think it is a very important principle that is involved here. I have explained the principle and how

I feel about the principle in my statement. I am standing on the principle and I am standing on the statement.

The Chairman. I order and direct you to answer the question, sir.

Mr. Shelton. I refuse to answer the question, sir, on the basis of the grounds set forth in my statement.

Mr. Sourwine. I have no more questions, Mr. Chairman.

Senator Welker. No questions.

Senator Jenner. I have no questions.

The Chairman. You may stand aside. You are released from the subpoena. Who is the next witness?

Mr. Hitz: That is all for you to read, sir.

By Mr. Hitz:

Q. May I note that we have stopped reading on page 1728 of Government exhibit 8 for the convenience of the record.

[Tr. 249] Your Honor, I would like to amend something that I said when I asked Mr. Sourwine to read the opening statement and colloquy that followed on the first day of these hearings, on January 4, 1956, at a time prior to Mr. Shelton's appearance, which was on the 6th and Mr. Sourwine stated that Mr. Shelton was not present at that opening of these hearings.

I said at that time that the statements made by the members of the committee and its chairman there were not chargeable against Shelton in the sense that he was there and heard them.

I would like to withdraw that part of my remarks because I overlooked the fact that it is apparent from what we have read here, in his own testimony, that he was familiar with what took place in the hearings on the 4th and the opening statement of the chairman, because he referred to the opening statement of the Chairman on the 4th, as we remember the reading here on the 6th, when he said that he is not one of those named by Mr. Burdett and that he did not think he had any connection with this investigation.

So, I would like to amend what I said, and that opening statement of the 4th of January, 1956 we believe to be relevant in all respects to all of the issues having to do [Tr. 250] with the testimony of Mr. Shelton on the 6th of January.

Those issues would then be the legislative purpose of the hearings; the subject matter of the hearings; the actual pertinency of the questions; the awareness by the witness of the pertinency, and any other related issues that his other testimony would have a bearing upon.

Moving now to a different phase of our case, I would like to invite the Court's attention to government exhibit No. 9 which is the Annual Report of the Subcommittee, actually that of the Full Committee made by the Subcommittee, to the Senate for the year 1956. The entire report is in evidence.

I would like particularly, however, to invite the Court's attention at this time in the trial to certain portions of it. I don't think that I furnished the Court with a copy of this, so may I hand up the evidence copy?

The Court: Does Mr. Rauh have a copy?

Mr. Hitz: He does not have one from me. I don't know whether he has one of his own. I did not give him one.

The Court: Do you have a copy?

Mr. Rauh: I do not have one, your Honor, but [Tr. 251] I don't care for one. If he is finished with the witness Sourwine, why can't we cross examine? I do not see why he should start now to read new material.

Mr. Hitz: I am not reading anything.

I would like to invite the Court's attention—

Mr. Rauh: I object to inviting the Court's attention to anything unconnected with the witness Sourwine. If he has finished with the witness Sourwine, let me cross examine.

Mr. Hitz: I am not finished with Mr. Sourwine.

The Court: All right.

Mr. Hitz: In the table of contents, the Court may note on page VI a section of this document which is VII entitled "Communists in Mass Communications and in Political Ac-

tivity," a subheading being "Communists in the Field of Mass Communications."

The entire VII is of particular relevance here, and I would like to invite the Court's attention to page 95 which is the commencement of this action. I will not read that. There are stated matters concerning newspapers generally in this country and elsewhere, and I would like to ask Mr. Sourwine a question here.

By Mr. Hitz:

[Tr. 252] Q. Was Alden Whitman one of the newspapermen who was called in this phase of the hearings, both in executive session in New York in December, and in the open sessions, as was Robert Shelton in Washington in January of 1956?

A. Yes, sir.

Q. With that I would like to invite the Court's attention to the fact that on page 100 of this document Alden Whitman's name is mentioned with reference to his testimony.

In the section there, or in the second full paragraph the commencement of which is "Alden Whitman.

The Court: All right.

Mr. Hitz: I will not read that. I am merely noting that for the convenience of the Court. I may interrupt what I am saying to suggest that the document here, this report, made subsequently but for the year in question is being emphasized at this stage as bearing upon legislative purpose by which I mean the use made with respect to the full body of the Senate of these particular hearings, and in reporting the hearings and the summarizations of the hearings to the full body bearing on [Tr. 253] legislative purpose.

The Court: All right.

Mr. Hitz: I would like to invite the Court's attention to page 102.

Mr. Rauh: I object. This is argument, Your Honor please. It has nothing to do with Mr. Sourwine. I do not understand what kind of a trial this is in which, in the middle of an examination of a witness a speech is now being made

about something unrelated to the witness, Your Honor. I object.

The Court: Wait just a moment.

What is the procedure you are following, Mr. Hitz?

Mr. Hitz: Well, in the Watkins case which Mr. Raub—

The Court. No, what I mean is, referring now to exhibits that have already been introduced in evidence, with a witness on the stand, and the Court naturally presumed that you were going to in some way relate the exhibits, that have already been introduced, to this witness.

Mr. Hitz: Well, I am inviting the Court's attention so that I need not read the entire thing, to certain parts of the annual report for 1956 which is in evidence—the entire document is.

The Court: Yes, but isn't that the nature of [Tr. 254] argument to be submitted to the Court at the termination of the trial, because the entire record is in evidence.

Mr. Hitz: Well, it is, indeed. But I do not want to burden the Court by asking the Court to read this whole document. If I point out certain portions of it which I am doing now, I think that it would be of aid to the Court. Otherwise, I would have to either read a lot of this or ask the Court to read parts. If I pinpoint parts, I think I am being helpful to the case.

The Court: The Court appreciates that but the Court is still concerned with your reference to the exhibits that have already been introduced that are particularly relevant to the issues of the prosecution.

Mr. Hitz: Yes.

The Court: With this witness still on the stand, and I presume there must be some relationship between this witness and what you are now saying.

Mr. Hitz: Yes, there is.

The Court: What is it?

Mr. Hitz: Well, the relationship is that he is chief counsel of the subcommittee that prepared this document for the Judiciary Subcommittee.

The Court: Now, are you going to have him refer in any way to—

[Tr. 255] Mr. Hitz: Yes, he is going to give some testi-

mony after I pinpoint certain matters in here. Now, for example, if I did not have him on the stand now to say that Alden Whitman had testified in executive session and in open session at both times that Mr. Shelton did, and thereby reporting those matters in the summaries of those matters to the full body, I would have to go to some documentary evidence and prove Alden Whitman did, but if he was there, he can say Alden Whitman did on both occasions. It is competent evidence. It is a short way of doing what I would have to do otherwise by introducing the entire hearings.

The Court: The Court was of the opinion yesterday counsel for the defense had no objection whatever to the authenticity of the document.

Mr. Hitz: Yes, I understand that to be his position. We think that is helpful to the trial of the case.

The Court: But that he had serious objection from the procedural standpoint of the document.

Mr. Hitz: I am not sure that I follow which document.

The Court: Well, the record will reflect it, but [Tr. 256] practically all of the exhibits, the fact is the Court recalls that he agreed that all of the exhibits the authenticity was admitted.

Mr. Hitz: That is correct. That is my understanding.

If his point is that I should not make these pinpoint references for the aid of the Court in a lengthy document—this document is 338 pages long—I am not going to ask the Court ever to read that. If I don't do it, I have got to ask the Court to refer to certain parts of it. That I am doing but the fact that the witness is on the stand is of aid in that procedure. Now, I do not intend to make any legal argument here. I have not done so despite Mr. Rauh's objection.

But I think that Mr. Sourwine is considerably in aid of the procedure I am attempting to adopt. When I get further on with respect to Matilda Landsman's summary as contained in this annual report, Mr. Sourwine will be a further aid. So I am leaving him on the stand as part of my direct examination despite the fact that I am on another government exhibit.

The Court: All right.

Mr. Rauh: I assume you have overruled my objection

that it is improper for Mr. Hitz to refer to [Tr. 257] documents that are unrelated to his questioning, and the witness on the stand at this time.

The Court: And you agree with the Court that you have no objection whatever to the authenticity?

Mr. Rauh: We have never challenged the authenticity of any documents that came in here. Practically all of them have been irrelevant but none of the questions are on authenticity. I am challenging something else. This trial is being run almost as a circus by Mr. Hitz.

The Court: Wait just a moment. That is for the Court to determine. That is an observation by counsel. The Court agrees that I still do not quite understand why this is not argument, why it is not at the conclusion of your case that you do not pinpoint, because counsel for the defendant has agreed that all of the exhibits and all of the contents of the exhibits are accurate and did occur. But he objects to them on the basis that they are irrelevant, not pertinent.

Now, wouldn't that be a question of final argument, at which time you could pinpoint what you say in your final argument?

Mr. Hitz: Yes, I could do it that way but I would also have to have some testimony from Mr. Sourwine [Tr. 258] before I could do it. For example, there is nothing in this case so far, and there is no way I can elicit except for Mr. Sourwine, because there is no record that is available to me that a number of the persons who testified in January 1956 had been called theretofore in executive session.

The Court: But the counsel is not objecting to your asking Mr. Sourwine any questions.

Mr. Hitz: Well, I realize that I have not pleased Mr. Rauh in hardly anything that I have done. It is not my purpose to do so. I feel that, if I did please him very much at this trial that perhaps I would not be doing too good a job. I know he objects but, if I should ask Mr. Sourwine the numerous questions that I was going to ask him as I look at this document and not with the references that I will make to the document, I don't think that it would have as much pertinency and value to the case.

I will, if the Court rules that way, of course, proceed in

that way. But I feel that Mr. Rauh is attempting to interject himself and his wishes into the conduct of the case by the prosecution. I do not feel that I am making argument. If I were making argument, I [Tr. 259] would feel I could do this only in argument but I don't feel it is argument.

The Court. Well, for the purpose of continuity, let's refer to those parts of the exhibits that are already in evidence on which you are to ask Mr. Sourwine a question.

Mr. Hitz: Yes, sir.

The Court: We can leave the rest to final argument.

Mr. Hitz: Yes, I will do that.

By Mr. Hitz:

Q. Mr. Sourwine, in the 1956 annual report of the 1956 Annual Report of the Subcommittee on page 172, there are references of an, apparently a summary of the testimony of William Price. I will ask you first—did William Price testify in the public hearings of the subcommittee on January 4, 5 and 6, or any one of those days, 1956?

A. He did.

Q. Did he also testify in the executive sessions in December of 1955, in New York at which appeared Robert Shelton?

A. He testified in executive sessions prior to the public appearance and in the same series of executive sessions in which Mr. Shelton testified. I am unable to say from memory the day on which Price testified.

[Tr. 260] Q. I see. But in the same executive sessions and he did in the same open sessions.

A. The same series of executive sessions, that is correct.

Q. Now, on page 103 of this annual report the name Seymour Peck and his testimony appears. I will ask you the same question with respect to Peck. Is he one of the ones who were called in open session and in executive session at the time when Shelton was called?

A. Yes, with the reservation that I am not sure he was called on the same day. But it was part of it.

Q. I said the sessions. I did not say the day, I said the sessions.

A. I understood you to say the same times. I was trying to be clear in my answer.

Q. All right, sir.

Page 103 as well, reference is made to Matilda Landsman and a summary apparently of her testimony, continuing over on page 104. I will ask you, did she appear in the executive sessions and in the open sessions as did Mr. Shelton?

A. Yes, sir.

Mr. Hitz: Your Honor, I would like to ask your [Tr. 261] permission, for the sake of continuity and so that as we progress certain things which I will not ask the Court to read or to hear me read, that you, nevertheless hear what I would like now to read, the permission being that I read page 103, the summary of Matilda Landsman's testimony in the annual report.

Mr. Rauh: Objection on the grounds stated, Your Honor, that this is improper examination of this witness to interject into the testimony a lot of reading from the exhibits that have already been admitted.

The Court: Yes, the Court feels that the objection should be sustained.

Mr. Hitz: Very well.

The Court: If you can relate it to this witness, the Court is perfectly willing to let you use this witness. My only point is, we already have these documents in evidence and they speak for themselves so far as the Court is concerned. I know you are going to refer to them specifically and perhaps in detail.

Mr. Hitz: Well, I will make answer to that. It was my purpose, if permission was granted, to read the summary of Matilda Landsman's testimony as it appears in this report. I was then going to—and this is why I am keeping Mr. Sourwine on the stand—now I feel that it [Tr. 262] would be perfectly proper for me to read.

The Court: Wait a moment. Suppose you come up here.

(At the Bench.)

Mr. Hitz: I, of course could, since this exhibit is in evidence, read 138 pages of it. I am not going to do that. But we are coming somewhat close to it—not in volume but we are coming close to making more use of this than I otherwise would. I think I can read any portion of this document that is relevant and material. All of it is in.

The Court: There is no question about that but the objections that the counsel for the defendant, as the Court sees it, is entitled to cross examine this witness if you are through with the witness.

Mr. Hitz: I am not through with the witness.

The Court: Well, then why read into the record something that can be read into it at a later time unless it is related to the witness?

Mr. Hitz: I see. All right. This summary of Matilda Landsman's testimony, I am going to request to read. She testified in executive session. I have a copy of her executive session testimony. I want to get that or a summary of it in evidence in this case as bearing upon something that transpired prior to the appearance of [Tr. 263] Mr. Shelton on January 6, showing the reason, or one of the reasons why he was recalled to give testimony and to show the pertinency and relevancy of the testimony. This will reflect upon that.

It won't be our only proof of it. If I am able to ask Mr. Sourwine, after reading the summary of Matilda Landsman's testimony—and it is the summary of her public testimony because there would not be any point in having executive testimony unreleased, and then summarizing it here.

I wish to ask Mr. Sourwine if he is able to give us, by way of summary, the testimony of Matilda Landsman in Executive Session. If I am unable to do that—and it would be proper and competent for me to do it and I have a case on the subject—but if I cannot do it, I am going to have to read 22 pages of her executive testimony. That is all. That is the alternative by way of procedure. I will do it either way but I think it would be much shorter and better and more to the point if Mr. Sourwine were able to give his recollection, after hearing this, of her executive testimony. I can do it either way. That is what I am trying to keep him on. [Tr. 264] The Court: The Court thoroughly agrees with

you. But can't you just ask Mr. Sourwine if he recalls the testimony of Matilda Landsman? Was there any reference made to the defendant in that testimony; can't you ask him that, and when was it given? That is what we are concerned with.

Mr. Rauh: He can't ask him that because he knows there wasn't any reference.

The Court: Well——

Mr. Hitz: Yes, I can ask him that on the stand. I have already asked him that off the stand and he says, I do not recall it sufficiently. I have got to read 22 pages of this in order to have him testify. This, I think is going to refresh his recollection.

The Court: All right, you may proceed.

(In open court.)

Mr. Hitz: I would like now, and I think I have been given the permission of the Court, to read the summary of the testimony of Matilda Landsman as reported in the annual report of the subcommittee.

The Court: You may proceed.

Mr. Rauh: We object to this, your Honor, on the following grounds. In the first place, the best evidence of Matilda Landsman's testimony is her testimony, [Tr. 265] not a report.

The second ground is that it is not proper examination of this witness.

The third ground is that it has nothing to do with Shelton because she never mentioned Shelton.

Mr. Hitz: The Myers case——

The Court: Wait just a moment. The objection will be overruled. You may proceed.

Mr. Hitz: Thank you.

Quoting from page 103 and following, and I am interpolating——

“The Witness;” meaning Peck—end of interpolation—“said he knew Matilda Landsman when she was secretary to John Desmond on the Times but refused to say whether he knew her as a Communist then.”

I am sorry. I will not read any further at that point, I would like that to be stricken. It is not where I intended to read.

The Court: All right.

Mr. Hitz: I would like to read beginning on page 105, the bottom of page 104.

"Robert Shelton, a copy reader on the New York Times, was another witness [Tr. 266] who employed the device of challenging the subcommittee's right to question him, and who has been convicted of contempt of the Senate for refusing to answer on that ground.

"Among questions to which he declined to give responsive answers were whether he has ever been a member of the Communist Party, whether he is acquainted with any persons known by him to be members of the Communist Party, whether he ever attended Communist meetings, whether he knows Matilda Landsman, whether he ever had any conversation with Matilda Landsman, what he told his employers as to any past Communist activity on his part.

"The subcommittee also questioned three members of Typographical Union No. 6, called the Big Six in New York City. They were Miss Landsman, Otto Rentino Albertson and Jerry Zalph. All were employed on the Times. All were asked about a report that Communist members of the union were plotting to take over control of the Big Six. Each refused to answer this question, invoking the fifth amendment and each refused, on the same ground, to deny or affirm Communist membership.

"Miss Landsman said she had been at the Times as [Tr. 267] a linotype operator for about a year. She said the normal union apprenticeship for a linotype operator is six years but declined, using her constitutional privilege, to say whether she served the full apprenticeship and what special provisions are available under union rules for obtaining a union card in less time.

"She refused, also, to say when she was first employed at the Times though an earlier witness said she

had served as secretary to one of the newspaper's executives and also as secretary to an executive of the now defunct New York Star, Joseph Barnes.

"Miss Landsman would not acknowledge acquaintance with either Albertson or Zalph, would not say whether she had turned over her apartment at 161 West 16th Street, New York to Francis Edmond Mannix and his wife, whether she knew them or Emma Harrison or Ira Henry Freeman or Charles Grutzner or whether John McManus nominated her in 1948 for membership or the executive committee of the New York Newspaper Guild.

"She invoked the Fifth Amendment as to whether she set up a placement bureau under Harold Mechling and with the help of John Weilburd after the Star closed up and whether she placed various individuals in [Tr. 268] new jobs. She used the same basis for refusing to say whether she was ever a telephone receptionist on the Times and whether she ever reported to Communist Party headquarters relative to information she obtained at the Times."

By Mr. Hitz:

Q. Now, Mr. Sourwine, were you present at the executive testimony of Miss Landsman in December, 1955?

A. Yes, sir.

Q. Were you its interrogator?

A. Yes, sir.

Q. Would you be good enough to give us your recollection of what Miss Landsman testified at that time?

Mr. Rauh: Objection, your Honor. There is a perfectly good transcript of what Miss Landsman testified to. What this man remembers she testified to is of no significance whatsoever.

Mr. Hitz: With respect to the first part of his objection if it goes to best evidence, the Myers case in this jurisdiction decided that counsel for a Congressional committee was properly called to testify and give his recollection of testi-

mony at which he was present at or before a committee. In fact, it was such [Tr. 269] important testimony that it was the basis for perjury. Myers was charged with perjury. The counsel gave his recollection of what that testimony was upon which the perjury was based.

Later the government also offered the transcript. Two objections were made: One, the incompetency of the testimony given by recollection; No. 2, it was compounded by the introduction later of the transcript—whatever that means.

The Court held that the best-evidence rule did not apply, that the counsel did not testify as to what the contents of the document was, that is, the transcript. He was testifying to his recollection of events that he saw and hears.

A certiorari was denied in the Myers case. That was the principal contention made.

The Court: The objection will be overruled. You may proceed.

Mr. Hitz: Do you have in mind the question, Mr. Sourwine?

The Witness: I believe so.

I believe the answer is that Miss Landsman testified that she was employed by the New York Times [Tr. 270] and she was or had been employed in the capacity of a typesetter for about a year. She first answered the question as to how long she had been employed by saying "about a year." It developed later, through prompting by her counsel that she meant that that was the time she had been employed in the Typographical Department. She refused to claim any of her privilege under the Fifth Amendment as to self-incrimination to answer a number of questions, including questions as to her prior employment with the New York Times, whether she had been training to be a linotype operator, or whether she had short-circuited the Union rules with regard to apprenticeship for typesetters, how that might have been arranged. She refused to answer questions as to whether she knew, a long list of people.

She refused, in every case, claiming her fifth amendment privilege. Also, to answer questions of whether she had been a member of the Communist Party and whether she

had acted in response to Communist instructions in certain instances, whether she knew of a plan or program of the Communist Party to infiltrate and take over the Big Six Typographical Union.

I am not sure that is all she testified to, but [Tr. 271] that is a fair summary, I think.

Q. And some direct questions on that. Was she questioned with respect to her participation in the activities of the newspaper field?

A. Yes, sir, she was. I left that out.

Q. Did she answer or did she refuse?

A. She refused to answer.

Q. Was she questioned with respect to her activities allegedly placing persons on other newspapers after the Evening—or whatever—Star it is in New York had gone out of business?

A. Yes, sir, there were several questions about this. She was asked if she had operated or assisted in the operation—I am not sure how it was phrased, of a placement bureau for the Guild and had placed persons on the New York Times and their names were mentioned. She was asked if she placed them on the New York Times. She claimed the Fifth Amendment and refused to answer all of those questions.

Q. I see. And that was before Mr. Shelton testified in January of 1956?

A. Yes, sir.

Q. Was it also before Mr. Shelton was summoned to [Tr. 272] come back and testify in the open sessions of January 1956?

A. Yes, sir, it was the day before that Mr. Shelton testified in executive session, if I remember correctly.

Q. Was it before your discussion which I think you said you have had or did have with the Chairman of the Committee with respect to the recall of Mr. Shelton?

A. It was.

Q. Was that any part of the discussion that you had with the Chairman at that time for that purpose?

A. No, I did not discuss that with him at that time.

Q. I see.

A. I did as I told you, now, on an earlier occasion, recount the story of Matilda Landsman to the Chairman. But we did not further go over, or go over the question again of calling the people back.

Q. I understand. Now, was the Chairman present at the time Matilda Landsman was in executive session and testified about which you have testified?

A. I am sorry, sir, I do not remember.

Q. Can you refresh your recollection?

A. Yes, sir.

Q. Will you do it?

A. No, sir, he was not.

[Tr. 273] Q. Now, as the interrogator and as one present at Matilda Landsman's executive session, did you or did you not recommend to the Chairman that Mr. Shelton be recalled?

Mr. Rauh: Wait a minute. One second. What is the relevancy of this?

Mr. Hitz, Matilda Landsman never mentioned Mr. Shelton in any way, shape or form. I object to the question.

Mr. Hitz: Matilda Landsman was a fellow employee on both sides of the New York Times, at times when Mr. Shelton was also an employee. There was information communicated to—

The Court: What was your question?

Mr. Hitz: If Mr. Sourwine, as the interrogator and one present at the hearing in Executive Session of Miss Landsman, made a recommendation to the Chairman that Mr. Shelton be recalled.

Mr. Rauh: I object on an additional ground, which is that the witness has already testified that he made no special representation as regards Shelton. He made a representation with regard to all of the witnesses in one list recalled. There was no special mention of Shelton. I object on both grounds.

[Tr. 274] The Court: The objection is sustained.

Mr. Hitz: I have no further questions of Mr. Sourwine, your Honor. Thank you.

The Court: All right.

Mr. Hitz: I do have one other thing I would like to do, I would like to have you give me the executive session here. Is this it?

The Witness: There is more than that in there.

Mr. Hitz: I know there is. But is it in there?

The Witness: Yes, sir.

Mr. Hitz: Will you remove from that the testimony of the Executive Session, the testimony of Miss Landsman?

The Witness: Yes. If your Honor permits——

Mr. Hitz: This can be done later.

The Witness: May I make a statement with respect to how I am able to do this, since ordinarily executive sessions of the Commission are confidential and I would not have authority.

The Court: You may.

The Witness: The Committee has approved a resolution, of which I recently got notice, authorizing release of this testimony for the purposes of this trial from the sanction of the Executive.

The Court: All right.

[Tr. 275] The Witness: I will have to cut this, Mr. Hitz.

Mr. Hitz: Well, just a minute. It is all right.

Mr. Rauh: Last night, Your Honor, I loaned you my brief of the Supreme Court. Would it be possible to borrow it back?

The Court: Yes.

Mr. Rauh: It is white.

The Court: Here it is right here.

Mr. Rauh: Thank you.

Cross-examination.

By Mr. Rauh:

Q. Mr. Sourwine——

A. Here it is. May I identify it, please? It runs, beginning with page 225 consecutively through page 245 from the particular volume from which I have taken it, that would be the volume including other witnesses. In execu-

tive session. That volume shows on its front it was testimony given December 6, 1955 at New York City, New York.

Mr. Hitz: I would like the clerk to mark this copy of Executive Testimony of Miss Landsman Government Exhibit No. 11 for identification.

(Government exhibit 11 is marked for identification.)

[Tr. 276] Mr. Hitz: I am not offering it at this time. I think, if Mr. Rauh requests to make use of it, it is here for him.

The Court: Do you feel that you are going to make use of it?

Mr. Rauh: I would like to read it. I cannot tell until then.

The Witness: If your Honor please, if this is not a bad time, I would like to have a short time.

The Court: Certainly.

(A brief recess was taken.)

By Mr. Rauh:

Q. Mr. Sourwine, are you familiar with 2 USC 192?

A. "Familiar," is a pretty strong word. If I do not disremember that is the Code provision with respect to Contempt of Congress.

Q. That is correct, Mr. Sourwine. Do you recall that it states that it makes it a crime to refuse to answer any question pertinent to the question under inquiry.

A. Yes, sir, I do.

Q. Are you familiar with the indictment in this case?

A. No, sir, I am not.

Q. I hand you, Mr. Sourwine, a copy of the indictment [Tr. 277] and ask whether you would mind reading it.

A. To myself or aloud, sir?

Q. You can read it to yourself.

A. Yes, sir.

Q. The indictment states, does it not, that the subject of Communist activities in news media was the question under inquiry, is that correct?

A. No, that is not exactly accurate.

Q. You make it accurate.

A. It says, picking up after that "on the subject of Communist Activities in news Media which was a subject and question of inquiry within the scope of the authority of the subcommittee."

Q. That is not the part I wanted you to read.

A. That is the part you pointed to.

Q. Read the whole paragraph.

A. Gladly.

"On January 6, 1956 in the District of Columbia the said Committee was conducting hearings pursuant to the appointment and authorizations set forth above and to S. Res. 58—84th Congress and to the Standing Rules of the Senate, on the subject of Communist activities in news media, which was a subject and a question of inquiry within the scope of [Tr. 278] the authority of the Subcommittee."

That is the whole paragraph you wanted, Mr. Rauh?

Q. Yes. Now, the question under inquiry which the indictment alleges therefore, is it not, Communist activities in news media, Mr. Sourwine?

A. Yes, sir.

Q. When did that become the subject under inquiry of this subcommittee?

A. If my memory is correct, it was in 1951. It may have been earlier in that year. It may have been right at the end of 1950, but I think the beginning of 1951.

Mr. Hitz: 1951 was your last word?

The Witness: Yes.

By Mr. Rauh:

Q. In what way did that become the subject under inquiry in 1951?

A. Well, now, you are stressing the word "it"? It became a subject of inquiry in 1951. When the committee began asking questions about it and investigating with respect to it.

Q. The indictment, I call your attention again, alleges

that on January 6, the subject under inquiry was Communist activities in news media, and I again ask you when did that [Tr. 279] become the subject under inquiry of your subcommittee?

A. Well, it did not become the subject under inquiry on January 6 until January 6, Mr. Rauh.

Q. How did it become the subject under inquiry on January 6, by whose decision?

A. Oh, I see what you mean. I think in that connotation it became the subject certainly to be inquired into on January 6, when it was decided that a number of the witnesses who had been heard a month before were to be called back for a hearing on January 6. Because all of those witnesses were in this particular sphere.

Q. When it was decided, by whom?

A. By the Chairman of the Committee, sir.

Q. In what fashion did he make his decision to hold a hearing on January 6 on the subject of Communist activities in news media?

A. By orally approving a recommendation that he would do so and signing subpoenas for appearances on that date.

Q. What do you mean by "oral—" just one moment, please, now.

Miss Reporter, will you read back the answer?

(The record is read.)

[Tr. 280] By Mr. Rauh:

Q. Do I understand, Mr. Sourwine, you went up to the Chairman and said, "Let's hold a hearing on the question under inquiry of Communists in News Media"?

A. I do not know what you understand, but I have not testified to that effect, Mr. Rauh.

Q. Well, what was that that the Chairman approved?

A. The Chairman approved a recommendation from me that we hold a public hearing on the date mentioned, January 6, 1956, and that certain witnesses be subpoenaed for that date.

Q. And that is all he approved?

A. Well, Mr. Rauh, no, it is not all he has approved. He has approved many things at many other times. That is all he was asked to approve at this particular time and that is all he approved at this particular time, if that is what you mean.

Q. All he approved at this time was a list of witnesses to be called for this particular day, is that correct?

A. No, sir, that is not correct.

Q. Then state it correctly.

A. I have stated it correctly, sir. The Senator [Tr. 281] approved my recommendation that we hold a public hearing on this date, and he approved the calling of the particular witnesses whom I recommended be called and he signed subpoenas for those witnesses.

Q. And that is all he approved?

A. Nope, there is an inaccuracy in what I have said, because there were a number of instances in which it was not necessary to subpoena those witnesses and we had already an arrangement with counsel and their appearance would be secured by the notification of counsel. He did sign necessary subpoenas and did approve the calling of the witnesses back on January 6.

Q. Let us get this perfectly clear.

A. Yes, sir.

Q. Do I understand that what the Chairman approved was that there be a public hearing on January 6 and these witnesses would be called and nothing more, is that correct?

A. In the first place, I do not know what you understand.

In the second place there was no stipulation with respect of nothing more. The Chairman was asked to approve this. My memory was—my recommendation was that we hold a hearing on this date. I did not recommend anything more. [Tr. 282] I recommended that we hold a public hearing on this date and that we call certain witnesses. This the Chairman approved.

Q. Did you recommend anything else?

A. At that particular time, no, sir.

Q. Was there a committee meeting setting this question under inquiry for January 6?

A. No, sir.

Q. Was there a committee meeting approving this list of witnesses for January 6?

A. No, sir.

Q. Now, when you said a moment ago that the question under inquiry of Communist infiltration in the news media was started in 1951, will you tell me how that was started? Was there a committee resolution on that?

A. No, sir.

There was no specific committee resolution on that.

Q. Well, how did the inquiry get started back in 1951?

A. Because the Chairman instructed inquiries be made. That our investigations include this subject and at the time he did so the Chairman then being not the present chairman but the late Senator McCarran, the inquiries [Tr. 283] were started.

Q. How was that done by Senator McCarran, orally, or in writing?

A. I am not entirely sure, sir. I believe it was done orally.

Q. To whom was the oral instruction to start an investigation of Communist Infiltration in News Media given?

A. I am not entirely sure of that. It was eventually conveyed to me. I was at the time counsel of the full committee, the Chief Counsel of the Subcommittee was Judge Robert Morris, who was not then a judge, I am sorry, Robert Morris, later a Judge in New York; whether Senator McCarran first told Bob Morris to do it and it was then conveyed to me, or whether he told us to go, I have no independent recollection. I do know that it was discussed among the three of us on more than one occasion, but I have no independent recollection of precisely what was said on those occasions.

Q. Did you ever say that Communist infiltration in the newspapers was not the subject under inquiry at the January 4, 5 and 6th hearings, Mr. Sourwine? Did you ever say that?

A. No, I did not.

Mr. Rauh: May I have committee 17, I think it [Tr. 284] is government exhibit 8.

Deputy Clerk: It is on the witness stand.

By Mr. Rauh:

Q. Now, you are absolutely certain, Mr. Sourwine, that at no time on January 4, 5 or 6, you ever said that Communist infiltration in the newspapers was not the subject under inquiry.

A. Mr. Rauh, I know what you are getting at, and I am absolutely sure that I did not.

Q. Answer my question yes or no.

The Court: Wait just a moment.

Mr. Hitz: If it please the Court, the witness answered the question and Counsel was shouting something, shouting so loud nobody could hear it.

By Mr. Rauh:

Q. What is the answer? You are certain you never said on January 4th, 5th or 6th that Communist infiltration of the press was not the question under inquiry—you are certain of that?

A. I am certain of it, sir.

Q. I ask the witness to read pages at bottom of 1615, this government exhibit, through the marked part on 1616 and then to make any explanation he sees fit.

A. "Mr. Glaser. As I have already informed you, I left the Communist Party almost 20 years ago, after a [Tr. 285] brief and painful experience, and my record since that time speaks for itself. I have not pleaded the fifth amendment. I have testified freely, with complete honesty and to the best of my ability. Not being a lawyer, I am consequently unfamiliar with all the legal ramifications involved in a proceeding such as this one. But from the humble viewpoint of a layman, it seems to me that my rights as a citizen have been abused and violated.

"The announced reason for this hearing was an intent to investigate Communist infiltration of the press and other forms of communication.

"Mr. Sourwine. Who announced that, Mr. Glaser?

"Mr. Glaser. Beg pardon?

"Mr. Sourwine. Who announced that?

"Mr. Glaser. I read that in the New York Times.

"Mr. Sourwine. For your information, the committee has made no such announcement. It is not accurate, and you heard the statement of the chairman this morning, concurred in by all of the members of the committee who were present."

You have a mark there. Is that where you want me to stop?

Q. You may make your explanation.

[Tr. 286] A. The explanation is simple. I jumped at that because it said the committee had made an announced—made an announcement as to the executive session. This is something we do not do. This is something I feel we could be criticized for doing without having a very good reason for doing it. It had not happened in this case. The statement in any newspaper that we had made such an announcement was wrong, erroneous and I wanted the record to show it.

Q. Mr. Sourwine, did you say something about an executive session? Does this hearing 17, do I understand this was an executive session?

A. The announcement, sir, as I understood it, had been made with regard to an executive session.

Q. Well, read it again. It said, "The announced reason for this hearing."

A. Yes.

Q. So it was an announced reason for this public hearing.

A. You asked me why I said what I said, and I did so for the reasons I have given you and because the committee had made no such announcement and because I wanted to correct the statement that there had been such an announcement.

[Tr. 287] Q. You said just a minute ago if I understood you, Mr. Sourwine, that you jumped at that because this would have been announcement prior to an executive hearing.

I call your attention to the fact that Mr. Glaser said the announced reason for "this hearing" which is in public. Will you or do you care to explain that discrepancy?

A. I think I have told you what the fact was, sir, as to what was in my mind at the time.

Q. You mean you thought this was an executive session when it was in open, a public hearing with Kleig Lights?

A. No.

Q. Would not that explain it?

A. All right, sir. I will go a little further. There had been additional statements in the press with regard to alleged purposes of this. Those statements had included statements made in advance of executive sessions. Those statements included this statement here that there was a press statement with respect to the purpose of the hearing. That there had been an announcement by the committee with respect to that matter; the committee had not made such an announcement and I challenged the statement.

Q. You thought at that time, did you, that the [Tr. 288] question under inquiry was Communist infiltration of the press?

A. I am quite sure of it.

Q. You are quite sure that you thought that was the question under inquiry at that time?

A. No, not "the." I do not know I would have phrased it that way. I think I would have used the phrase "communist infiltration of mass communications," or possibly Communist Strategy and Tactics in Mass Communications.

Had I tried to phrase the question under inquiry, that is how I probably would have done it. I knew where we were heading and certainly as you phrase it, "The communist infiltration in news media" was a subject under inquiry at this hearing.

Q. Can there be more than one question under inquiry at a hearing?

A. Oh, certainly.

Q. How many can there be?

A. There is no limit.

Q. How many were there at this time?

A. Oh, I would say there were a number of questions, sir. I do not know the precise number here.

Q. Just tell us—

[Tr. 289] A. I can tell you some of them and I can go on until we exhaust the list, I suppose, or if you want me to stop, we were interested of course, back of the matter of

communist infiltration of news media, and the general subject of Communist activity in the United States—and including espionage and subversion—we were interested in the specific subject of Communist infiltration into mass communications. Within that Communist infiltration in the news media.

We were interested within the sense that we were attempting to find out in this series of hearings in determining if we could, just what the Communist strategy was with respect to infiltration of Typographical Union Big Six. Just what part Landsman had played in it, who else was involved, we were interested in establishing if we could the membership among New York Times editorial side people in the Communist party, USA; we were interested in learning, if we could, something about the activities of that movement. Those are among the things that we had.

Now, do you want me to explain a little further? An investigation is one thing. A question under inquiry is another. An investigation is a moving thing. You have many questions in connection with it, you are moving forward, [Tr. 290] it may have many inquiries within it. Now, you cannot put a witness on the stand and limit your questioning to the purpose of eliciting one single fact. That is, you can do it but you cannot limit it to that. In the nature of things if you have a witness on the stand, you are going to elicit a number of facts and they are going to cover somewhat of a range of facts.

As I think I have said, certainly as has been said here, the vast majority of all of the questions asked of all, or certainly a majority of the witnesses in this series of hearings did have to do with Communist infiltration in news media.

Q. Have you finished?

A. Yes, sir. Does that give you what you wanted?

Q. No, because I want to phrase this question. You are talking in terms of investigation. I used the question in the terms of the statute which I first showed you and the indictment which I first showed you and I asked you to tell me what the questions under inquiry—you said there could be one or more—were at the hearings January 4, 5th and 6th.

A. Well, what I meant was when I asked you if you were satisfied, was whether you wanted me to attempt to go [Tr. 291] further and mention other questions that we were seeking to determine. Now, within the ambit of the statute, if that is what you wanted, my opinion, I do not know if I am an expert, but if you want my opinion within the term of the statute whether the phrase asked, or as used in the indictment was a subject under inquiry. I will say yes, I think it was.

Q. My question which you seem to be sliding off of here is: You said before there was more than one question under inquiry at that time. What were the questions under inquiry on January 6?

A. Well, I have tried to tell you some of them. Do you want me to see if I can think of any more?

Q. No, just tell me in terms of the questions under inquiry, what they were, in simple terms.

A. Well, I can only do so unless you instruct me to use different terms, within my own connotation of the word "inquiry;" I have tried to explain to you what that connotes to me. Now, within that connotation, we had under inquiry at this time a number of subordinate questions which could well be summed up in the phrase "Communist infiltration of news media."

I think there were two principal subordinate [Tr. 292] questions. One had to do with Communist activity on the news side, and the other had to do with Communist activity on the mechanical side in connection with the efforts to infiltrate Big Six and the activities of Miss Landsman and others in the composing room of the Times. There was some inter-relation between these two, still within the ambit of infiltration of news media, or Communist activity in that media, because we wanted to find out if we could, any leads that would show that cooperation if any existed between the Communists on the news side and the Communists in the mechanical side.

Then there were any number of subordinate questions within those two minimum heads, and you might even say that every question that was asked was in a sense in itself, an inquiry, if you want to go to the larger side, sir. Every

time the committee sits, it sits with its full authority. It could not divest itself of that authority by its own act. It could by its own act limit itself, or limit its actions within the scope of that authority. But in the absence of such an action by the committee to so limit its own action, whenever the committee sits, it must have in mind the range of what is charged by the Senate with an attempt to find out, trying to find out which is, among other things, activities against the Internal Security [Tr. 293] of the United States, including but not limited to subversion, espionage and so on.

Now, if we had a witness before us who was called because the committee at the time we called him thought that he had information about the activities of the person "X" and in the course of his examination the committee had an idea that he might be able to give information about his own activities in the Communist Party or about Communist activities in another area, I would think it would be not only the right but the duty of the committee to ask that question, so that in that sense, the whole scope of the committee's responsibility is always under inquiry every time they sit unless the committee, itself, has limited a particular hearing to a narrower field, and I know you do not want me to go into subdivisions of all the questions that would be technically within that scope. Because for the purposes here, isn't it enough that we did have questions under inquiry which did deal with Communist infiltration of news media?

Q. Mr. Sourwine, I call your attention to the statement made by the bill of particulars given by the government at the last trial. Mr. Hitz stated on page 20 of the Supreme Court record in answer to our request for a bill of particulars [Tr. 294] on what the question under inquiry was, at the last trial, quote: "The Government contends and the indictment states that the inquiry being conducted was pursuant to this resolution. We do not feel and it is not the case that there was any smaller, more limited inquiry being conducted."

In your opinion, was there any smaller, more limited inquiry being conducted?

A. Not more limited, sir. If "by limited" you mean that

the committee had less than its full authority. Certainly the particular passage of its broad subject matter in its duty to inquiry with which the committee was dealing with here, can be examined and be described, and I am willing to adopt your description that it was Communist infiltration in the news media.

Q. That was not my question, Mr. Sourwine. I am asking you—shall I read this again so I can ask—so you can answer my question?

A. I have not read that, sir.

Q. I will read it again.

A. I tried to answer your question.

Q. I will read it again.

A. All right, sir.

[Tr. 295] Q. At the last trial, in response to our request for a bill of particulars on the question under inquiry—not authority on the question under inquiry—Mr. Hitz stated, and I quote:

“The government contends and the indictment states that the inquiry being conducted was pursuant to this resolution. We do feel and it is not the case that there was any smaller, more limited inquiry being conducted.”

Was that a correct statement?

A. Well, sir, under my connotation of “inquiry,” I would not have used those words but I do not know under Mr. Hitz’ connotation. If you want to know why he used that, you will have to ask him.

Q. Did you ever testify at the last hearing that “broadly speaking” the question under inquiry was the scope and effects of subversion?

A. I believe I did, yes, sir. I have always, myself, taken the position that the committee sits always with its full power and at the time I gave that testimony I felt quite clearly that there was no necessity for ever narrowing down the scope of the committee’s powers or making any statement which might be twisted into a committee recognition or acceptance of the theory that the committee can only [Tr. 296] exercise a part of its powers at a time.

Q. You seem to have a marvelous way of coming to "authority." I am asking you whether you agree on the question under inquiry.

The Court: Wait just a moment. Will counsel please refrain from any characterization of the witness? The Court is trying the facts and the Court will evaluate it.

By Mr. Rauh:

Q. I repeat my question: Did you ever say that the question under inquiry at the January 6 hearing was the scope and extent and activities of the Communist conspiracy against the United States?

A. I believe I did, yes, sir.

Q. And is that still your testimony?

A. My opinion is, sir, that that was certainly a question under inquiry.

Q. I would like to repeat the question and I ask that he be instructed to give an answer.

A. Mr. Rauh—and if the Court please—I do not wish to be forced into the corner of answering this question yes or no, because this is not a question of either/or. It is perfectly possible, according to my best judgment [Tr. 297] and belief to have under inquiry at one and the same time the question of the whole scope of Communist activity and also to have under inquiry at the same time any lesser segment of that broader question. I did not draw the indictment in this case, sir.

Q. Did you consult with Mr. Hitz before the last indictment and the last trial on what the question under inquiry was?

A. I think I probably did. I have had a number of conversations with Mr. Hitz on this subject, and I think some of them preceded the last trial. Certainly he knew then and knows now what my view is with regard to the committee sitting with its full powers as I have expressed it here.

Q. When he gave the bill of particulars, that there was no smaller more limited inquiry being conducted, did he reflect your views in that or those conversations?

A. I was not consulted with respect to that.

Q. No, but did he give your views as to what the question under inquiry was?

A. I do not know. You will have to ask him whether he was giving my views or his own.

Q. I am asking you whether those were your views at the time: That there was no more smaller, more limited [Tr. 298] inquiry than the whole scope of the authority of this committee?

A. Yes, sir.

Q. Those were your views?

A. Yes, sir.

Q. Are they still your views?

A. I will answer that one, if the Court will permit, with an explanation.

Q. You may explain.

The Court: Yes.

The Witness: Yes, sir, they are still my views. But I recognize that there is a decision which might well be considered controlling, which now says that an indictment must contain, with more particularity, a statement of the subject under inquiry.

My own interpretation of that decision is that there has been a natural confusion between investigation and inquiry. I think there is a little imprecision in the Court's statements on two points and I do not believe anyone will argue about it.

The Court has stated, if I remember accurately, that it is necessary that there be a statement in the indictment respecting the subject under inquiry in [Tr. 299] connection with the refusals to answer. In connection with the questions refused. I am sure that what the Court meant was that there must be a statement somewhere in the indictment of the subject under inquiry with respect to each such question.

Now, that brings me to my particular understanding of the situation, because, as I have explained it, the committee may shift a particular thrust of a question, just as a man driving from here to Philadelphia may go any number of routes or take side tracks and still get to Philadelphia, and for that reason it is perfectly possible that a question asked the wit-

ness one moment may not have precisely the same subject under inquiry as a question asked the next moment, if you are going to accept the argument that the statement of subject under inquiry must be as narrow as possible, or must be narrowed within certain limits.

Those questions might all be clearly within the statement under inquiry as I believe it may properly be stated. That is, in the terms of the committee's resolution. But, if you accept the view or if you are under the instructions that you have to state it with more particularity, of course the greater you narrow that down, the more things are going to be outside of it, and it is possible [Tr. 300] to narrow that down until it will only fit one particular question. I certainly would agree that there must be an indictment—a statement with respect to the subject under inquiry with respect to a particular question which forms the basis of a count.

In my own opinion, and I do not think the Supreme Court has ruled on this yet, such a statement might be merely a statement of the committee's authority in the case of the Internal Security Subcommittee on an investigation such as this. If you want to narrow it down, I see no discrepancy between saying that we had under investigation at this time the whole range of our authority and this had not been narrowed and limited, and also stating that at this particular time we had under inquiry some particular segment of that authority, because I think the former statement necessarily embraces the latter.

So, I cannot answer your question either/or, Mr. Rauh.

Q. I think I can truthfully say you have answered it perfectly.

A. All right, sir.

Q. Did you ever say at the January 4, 5 and 6 hearings that the subject matter of the committee's activities or [Tr. 301] inquiry is Communist activity?

A. I am not sure, sir. If you will show me the record, I will refresh my recollection and be glad to tell you if I did.

Q. You cannot remember whether you said it or not, then—

A. I do not remember now, sir, the specific words I used at that time.

Q. Well, would that have generally reflected your view of what the question under inquiry was, if it was Communist activity generally, would that have reflected your view?

A. Well, you must remember I have already testified I had at that time the clear impression and belief that the committee was investigating communist activity as a part of its duty imposed on it by the Senate. This was not the whole of its duty and this was not the whole of what the committee was inquiring into, using inquiry in there in the broad sense to cover everything the committee was trying to get at, but certainly it was a subject of the committee's inquiry at that time and I do not think it was such a narrowing that would have been objectionable to me, even, the way I thought at that time. So [Tr. 302] I might very well have said it.

Q. What form did the action of the subcommittee to release Matilda Landsman's Executive Testimony come in, Mr. Sourwine?

Mr. Hitz: I did not get the question. Could it be read?
The Court: Yes.

(Question read.)

The Witness: Do you mean came to me?

By Mr. Rauh:

Q. In what form did the committee act, orally, in writing or what?

Mr. Hitz: Object. It is irrelevant to this trial. It is a committee matter as to whether or how they will release executive testimony. It has nothing to do with the trial of the case.

Mr. Rauh: On the contrary, your Honor, I am about to show that there are other things they could release, too, that would help the defense and go to important parts of this. I have a right to know how it came about that they released something that helped the prosecution?

Mr. Hitz: The prosecution is the only case that is on.

[Tr. 303] Mr. Rauh: This is cross-examination.

The Court: The witness may answer.

The Witness: I am confident I can give you a truthful answer to that, but I warn you it is hearsay.

By Mr. Rauh:

Q. You may answer.

A. I received a note written by Mr. Hitz' secretary or a girl in his office, a Miss Baker, who told me it was a message from my office—no, it was from Miss Baker of my office, I am sorry. It says, "The Resolution authorizing release of Landsman testimony has been approved by a majority."

I then called Miss Baker on the phone—it is Mrs. Dorothy Baker—and asked her if this were true, and asked her what Senators had signed the resolution to assure myself by my own count that it was a majority. That is how I know about it.

Q. This was by resolution then this morning?

A. By written resolution, and I am sure the action was completed this morning by signatures added this morning.

Q. Mr. Sourwine, you testified this morning that we—[Tr. 304] correct me, if I am wrong—it is my recollection that you testified this morning that when you gave the list of witnesses—

The Court: Wait just a moment. Let's go back to that question again, Mr. Rauh. You said that the question was pertaining to this morning.

Mr. Rauh: Yes, your Honor. I was changing the subject. I was coming back to the Matilda Landsman point later on.

The Court: No, but was there something in the paper?

Mr. Rauh: Oh, no, sir.

The Court: Well, was there a release?

Mr. Rauh: I am sorry, I do not get the point.

The Court: The Court had understood you to say there was a release of the Landsman testimony.

Mr. Rauh: No, it was stated at the time the Landsman testimony came in here today that it had been released by the committee.

The Court: Back at the time.

Mr. Rauh: No, it was a private document until about an hour ago. About an hour ago it was put in evidence here as

the first time that it ever was released. I did not [Tr. 305] use it in a newspaper sense. I used it in the sense it had been a confidential document of the subcommittee until Mr. Sourwine——

The Court: The Court understands you.

By Mr. Rauh:

Q. Now, let me see here, Mr. Sourwine, if I can correctly state your testimony with regard to the conversation with the then chairman Eastland. You gave him a list of prospective witnesses to be subpoenaed for executive session on which was the name of Willard Shelton, one name of which was Willard Shelton, and you told Chairman Eastland that you had reason to believe that all of them would give information relevant to Communist activity.

If I am wrong, please correct me now.

A. I do not want to say your statement is wrong, because I think that I probably conveyed that impression to Senator Eastland. But one, I do not remember the exact words, and two, I would not have limited it to Communist activity. What I was trying to convey to him was that in any event, in my judgment the committee had information which led me to believe that all of these people had information to which they could testify if they would, that would further our investigation.

[Tr. 306] Q. And you did not—am I correct—give case by case reasons for each of them?

A. I did not.

Q. And you did not further testify this morning, did you, that in the case of Shelton, Willard Shelton on this list, the reason for your representation was a written document to the Committee?

A. I think that was yesterday.

Q. Excuse me, if it was yesterday.

A. But I think I did answer that question that way. I do not think I said, "The reasons." But I think I testified to the effect that part of what I had in mind with regard to Shelton, which I said was not conveyed to Senator Eastland, had come to me from a written document which was described as signed with a pseudonym. That is my memory.

Q. Our only debate is whether you said a part oral. Obly the record can show that. I do not take the time now to get that.

A. To be accurate I do not think I said it. I think the question was phrased and I merely answered with an affirmative answer.

Q. So be it. My question now is—strike that.
[Tr. 307] Mr. Rauh: I move, your Honor, for the production of that letter for the following reasons:

I do not see how they can release part of the confidential material and refuse us confidential material that will help the defense.

Now, if your Honor is going to take the position—and I think there was some indication that your Honor might take this position—that they do not have to prove probable cause, then I understand that we are not entitled to this letter, because this letter will prove there is no probable cause.

I can go into it at some length on that ground but right now, I am asking for this letter on the ground that it does not behoove the government of the United States to release part of their files on Mr. Shelton. They released a document that does not refer to Shelton and refused to produce a document, the only document they have which they claim does refer to Shelton.

There must be a certain element of fairness even when the government is prosecuting that we have a right to see this document, your Honor. This is the document on which this man said to Senator Eastland, "Go after Shelton."

I say there is no such document. It is eight [Tr. 308] years old. It could not make a bit of difference in the government showing it to us. I claim there is no such document. If there is, it is signed that way, Napoleon Bonaparte, or something else which would make everyone know it is not reliable.

I think we are entitled to the document so I can examine Mr. Sourwine on this problem.

Mr. Hitz: There is no rule of evidence that would require the production of that document, your Honor. Mr. Rauh has cited none. At one time he cited the best-evidence rule. He does not do that now. If he did, it would not have any bearing upon the matter because there is no effort to prove

the contents of that document as a document. It is true, its use has been brought out by the defendant that it was a matter of information to Mr. Sourwine, but Mr. Sourwine's testimony here has to do only with what he told the chairman. That does not attempt to prove the contents of the document as it is introduced here through Mr. Sourwine. I say again there is no rule of evidence that will compel its production.

Mr. Rauh states something about "fairness to the defendant" merely because there has been released an otherwise confidential document this afternoon, or rather brought [Tr. 309] into court this afternoon having to do with Landsman's executive testimony, has no bearing whatever on the document that Mr. Rauh seeks to have produced. Even so, each document sought of production will, of course, stand on its own feet and there is no relationship between the testimony of Landsman in executive session and the document giving certain information on which was based Mr. Sourwine's statement to the Chairman. Second, the document sought of production here by Mr. Rauh is a document of the committee, part of the U.S. Senate, it is part of their confidential files and unless a reason which has a foundation in evidence is adduced here and is decided by the Court, the confidentiality of that as a document should prevail. No. 3, the production of that document might reveal the source of, or rather, the identity of a confidential informer and in that situation even the basis for the probable cause in a search warrant need not be disclosed, nor need the identity of the person furnishing that information to the officer swearing out a search warrant, that is fundamental criminal law.

In addition to that the document is no longer in existence. [Tr. 310] Mr. Rauh: This is the most flabbergasting thing I have ever heard, that the document which was in existence at the last trial has now been destroyed. I am really shocked, your Honor, that there should be anything like this occur, that a document on which the whole last trial occurred to which I went to the United States Supreme Court has now been destroyed by the United States Government.

I move for an acquittal on the basis that the Government has now destroyed the document on which we could prove

there is no probable cause and on which Mr. Sourwine said he went to the Chairman Eastland to get this subpoena.

I move for an acquittal on that basis.

The Court: The motion for the acquittal will be denied.

The motion for the production of the document will be denied.

Mr. Rauh: Yes, your Honor.

By Mr. Rauh:

Q. Will you tell us what happened to the letter, Mr. Sourwine?

A. Yes, sir, the letter was destroyed along with a great deal of other information in the files of the committee which was no longer useful and needed.

[Tr. 311] Q. When was the letter destroyed?

A. I am not precisely sure as to the exact time. It was done in connection with our move to the New Senate Office Building. The files were entirely rearranged. Where information was duplicated or was dated it was eliminated from the files unless it was evidentiary in character, unless we thought we might conceivably some day use it as evidence; and this letter, along with many other letters from informants, tips, notes, inter-office stuff for cases that had been reduced to hearing, and in some cases material where it had all been reduced to testimony, was all eliminated from the files.

Q. I ask you again when was the letter destroyed?

A. I can't answer it any better than to say I don't know exactly, sir.

Q. Well, roughly. A month ago, a year ago, two years ago?

A. I have identified it by an act of which you and I can find the date. It was in connection with our move to the New Senate Office Building and that was two or three years ago. I can't tell you now whether two or three. But I can find out when we moved and it was within a month, either way, so make it sixty days either way of that time. We spent [Tr. 312] ninety days or so on this job of bringing the files up-to-date.

Q. When did you last see the letter, Mr. Sourwine?

A. I believe I saw it at that time, Mr. Rauh. At the time that it was taken out of the files for destruction and elimination.

Q. Approximately two or three years ago?

A. Yes, sir.

Q. And you knew then that this case was pending in the United States Supreme Court in which this letter was a major factor and you ordered it destroyed, knowing that?

A. Mr. Rauh, I have already testified what happened to the letter.

Q. Did you know the case pending in the Supreme Court involved the existence of this letter and your credibility at the time you ordered it destroyed, sir?

A. In the first place, Mr. Rauh, I have not said I ordered it destroyed, although what happened might be subject to that interpretation. I did permit it to be destroyed. If what you are trying to ask me is whether in connection with the elimination of this letter from the files I had in mind and gave consideration to the fact that it was an issue in a case in the Supreme Court of the United States, I must answer [Tr. 313] you I did not.

Mr. Hitz: You did or did not? I didn't hear you.

The Witness: I did not.

By Mr. Rauh:

Q. Did you know at that time that the case pending in the Supreme Court involved the existence of this letter and your credibility; did you know it?

A. Again, if the Court will permit, I should like to state precisely what the facts were.

Q. I asked the question and I ask that it be answered: did he know this at the time?

I think I am entitled to that answer. Yes or no, did he know it. He can give any explanation he wants after he answers the question yes or no.

The Court: Can you answer it yes or no?

The Witness: If the Court please, let me explain my dilemma. I don't want to deny having any facts within my

knowledge. Certainly I knew there had been a conviction in the Shelton case. Certainly I knew when the case was upheld on appeal that that had been done. I am sure that I subsequently heard that the case had gone up on appeal to the Supreme Court, although I don't remember just how that information [Tr. 314] came to me. I did not hear the argument in the Supreme Court. I did not see the briefs. I could not as a lawyer deny the possibility that such an appeal would include the issues that Mr. Rauh has stated.

On the other hand, I did not have it in mind as something that somebody had laid before me and said, "remember this".

The Court: All right. You have answered the question.

By Mr. Rauh:

Q. Were any copies made?

A. No, sir.

Q. Are any copies in existence?

A. Not to my knowledge, sir, and not unless they were made by the writer, concerning which I have no information.

Q. Please name everyone to your knowledge who has ever seen this letter.

Mr. Hitz: I object. It is irrelevant.

Mr. Rauh: I am going to prove there isn't any letter. I am going to prove that letter was not destroyed. It never existed. I have a right to know whoever saw that letter.

[Tr. 315] The Court: The witness can answer if he knows.

The Witness: I know that Bob Morris saw it.

By Mr. Rauh:

Q. Who else?

A. I believe Ben Mandel saw it. It is likely that he would have seen it. I am not sure who else, if anyone, saw it though.

Q. Did Chairman Eastland ever see it?

A. Not to my knowledge.

Q. Any member of the Subcommittee ever see it?

A. Not to my knowledge.

Q. Did it ever occur to you to ask any member of the Com-

mittee before you destroyed it whether it should be destroyed?

A. No sir, it did not occur to me.

Q. Were you aware that we had subpoenaed that letter at the first trial?

A. To be honest with you I have no independent recollection now that you did. But if you did I certainly must have been aware of it at the time.

Q. Were you not aware and did not it happen in front of you that I made repeated demands for that letter while you were on the witness stand at the last trial?

[Tr. 316] A. Oh yes, you did that.

Q. Were you aware we were demanding that letter in connection with the proof of probable cause; were you not?

A. Yes, sir.

Q. Yet you permitted it to be destroyed in your own language?

A. I did, yes sir.

Q. You testified at the last trial, did you not?

A. In the Shelton case? Yes, sir.

Q. Do you care to change any of the testimony you gave in the last trial?

A. Well, I didn't come in here with anything in mind that I had testified to erroneously, sir, if that is what you mean.

Q. Yes. There is nothing that you now want to change in your testimony from what you said the last time?

A. There is nothing that I am now immediately aware of that I testified to erroneously at the time.

Mr. Rauh: May I please be permitted to have a five-minute recess, your Honor?

The Court: Certainly.

(Whereupon, a short recess was had.)

[Tr. 317] (Following a brief recess, the proceedings were resumed as follows:)

By Mr. Rauh:

Q. Mr. Sourwine, could we try now seriously to date the day on which you permitted the destruction, can you give it to me, say, within three months?

A. I think so, sir. I am not absolutely certain. But I would say it was probably in the last quarter of 1958 or very early in 1959.

Q. Did you consult with the United States Attorney or any of his Assistants before destroying a document which had been involved in a prosecution by the United States Attorney's office?

A. I did not consult with any one in the United States Attorney's office with respect to the destruction of this document prior to its destruction.

Q. Who did you consult—

A. I mean, concerning the destruction.

Q. When did you first for any time inform any member of the United States Attorney's office that this document had been destroyed?

A. I believe it was Friday of last week. It was [Tr. 318] either Friday or Saturday. I was asked about it. By Mr. Hitz.

Q. Did you suggest that the defense should be informed?

A. No sir, I did not.

Q. Did Mr. Hitz tell you at that time whether he was going to inform me that the letter had been destroyed?

A. No, he did not. We didn't discuss that.

Q. What is the procedure for destroying documents at your Committee, Mr. Sourwine?

A. Well, if the document is within one which has had a classification on it, we usually make arrangements to have it torn or shredded and then have it burned. We don't have a burn basket, but we follow precautions for that to be sure that there is complete destruction.

Unclassified documents are frequently destroyed by being cast into a waste basket paper to be sold as waste paper.

Q. Which is the document which you have been saying was in existence prior to this destruction? Was it classified or unclassified?

A. It had been previously a classified document up to

[Tr. 319] the time of destruction, sir. It had been treated as such too.

Q. Now not on the question of whether it gets torn into little bits or burned as to the procedure: I want to know who has the authority to order the destruction of documents on your committee?

A. I always assumed that I did: and I know in connection with the re-doing of the files I gave instructions which in general encompassed elimination of material which was duplication or obsolescent.

Q. Are you suggesting this was duplication or obsolescent, Mr. Sourwine?

A. No, I am not. I am only trying to answer the question that you asked.

Q. Who did you tell to destroy this letter?

A. I am not sure, sir. I have no consideration for this letter, of this letter, at the time, as a single entity. It was simply a part of material which was being eliminated.

Q. Who did you tell to eliminate the material of which this was a part?

A. Well, I, myself, am the person who abstracted it from the place where it had been kept and put it in the pile with other similar letters, to be destroyed. But I don't [Tr. 320] remember to whom the job of destruction was turned over.

Q. Am I clear that you took this letter out of a pile, looked at it, realized what it was, and then put it with a pile to be destroyed?

A. No sir, I do not intend for you to understand that, because that is not true.

Q. Then tell me what is true.

A. Yes, sir. This was one of a number of similar letters which were kept together and it was my decision that they had served their usefulness and that they could all be destroyed. I made that decision en masse without regard to the contents of any particular letter, and on the basis of that decision I put that group of letters which I am sure included this one, in the place indicating I intended for it to be destroyed.

Now that raises a point, Mr. Rauh. I want to be perfectly clear on the record. I have no memory of having seen this

particular letter in connection with the action that was taken on that whole group of letters. I know it wasn't pulled out and considered separately. I am confident that it was in that group and I am confident that it was destroyed.

Q. Why are you so confident if you have no recollection [Tr. 321] of seeing it?

A. Because there is no other person who had access to the place where they were kept, who would have attempted to exercise the judgment which I exercised, or who would have had any reason to have abstracted that letter and move it somewhere else. In the nature of things it just wouldn't be done.

Q. Where was it being kept?

A. It was being kept in a safe in the office of Internal Security Subcommittee.

Q. Had it ever been anywhere else?

A. Yes, sir, it had been back and forth to my desk a number of times, and it had I think on more than one occasion been in a locked file in another place in the offices of the committee.

Q. Where was that?

A. Well, that was down at the time, it was down at the sub-basement level in the Old Senate Office Building. I don't remember the room number. It was on the Delaware Avenue side, in a bricked-up entryway.

Q. Was it ever locked in the safe of the present Chief Counsel of the then Chief Counsel Mr. Robert Morris?

A. Yes, I am sure it was. I inherited his safe. I am [Tr. 322] sure it was at one time locked in that safe.

Q. You inherited his safe, is that so?

A. It is the Chief Counsel's safe. I am now Chief Counsel.

Q. You inherited Mr. Morris' safe with this letter in it; is that correct?

A. I think that is correct. I can't swear the letter was in that safe at the particular moment the change was made. But I think it was. I know it was in the safe at a time before that and I am sure it was in the safe at a time after that.

Q. I believe I asked you before but I forget the answer: when did you last see that letter?

A. Oh, the last time I saw that letter to recognize it as a

letter was,—I don't think that question has been asked. It would have been quite a long time ago. If I had answered it recently I would know the answer now.

Q. When did you last see the letter, Mr. Sourwine?

A. I am trying to recall when I did, Mr. Rauh. I mean, to know that this was that particular letter. I can recall no instance after the first Shelton trial on which I can remember seeing it, Mr. Rauh. I am satisfied in my own mind it was before that time. I saw it several times prior to [Tr. 323] that trial. I am not sure when the last time I saw it was, but it was I think perhaps a year before the first Shelton trial.

Q. Are you certain you didn't testify earlier this afternoon that you saw that letter last at the time of the destruction, Mr. Sourwine?

A. I am not sure that I didn't so testify, no sir; but if I did, I had in mind "saw" in the sense of being a part of a group of letters, and now being certain that it was in that letter, and I am now trying to be more precise and I have had my recollection for that refreshed by thinking about it, and I have no independent recollection of having seen this letter, as such, and recognizing it as the particular letter in the Shelton case, at the time this group of letters was destroyed.

I am satisfied that the connection of the letter with the Shelton case didn't cross my mind at the time the action was taken which led to the destruction of the letter. But when a request was made by Mr. Hitz for the letter, I went back in my mind and immediately recalled that this whole batch of letters was gone. I told him so.

Q. You say Mr. Hitz requested this letter from you?

A. Mr. Hitz asked me about the letter, asked me where it was.

[Tr. 324] Q. You testified just a minute ago Mr. Hitz requested the letter. Are you changing now?

A. Yes, if you mean that he asked me to deliver it to him, I think I would want to change that. He made a request for information about it. I don't remember the exact words. But I don't think he asked me to bring the letter or reproduce the letter. He has never had it. He did ask about it.

Q. Did any member of the committee know of the existence of this letter?

A. Not to my knowledge. I think it is entirely possible in case any member of the committee has read a record with respect to this trial. I just don't know. I have not discussed it with any member of the committee.

Q. Certainly no one knew of it before the trial, no member of the committee knew of it before the trial?

A. No, I am satisfied that no member of the committee did.

Q. Mr. Sourwine, at the last trial you testified, I believe—correct me if you think I am wrong—that the only basis of subpoenaing Mr. Shelton was this letter now destroyed?

A. I don't think that is entirely accurate. I do remember that I testified that the only information we had [Tr. 325] specifically about Mr. Shelton had come in this letter. I think we had other basis for calling Mr. Shelton.

Q. Would you repeat what appears to be an inconsistent position? Would you repeat what you just said? Or would the reporter please read it?

A. Whichever way you want it.

Mr. Rauh: I will ask the reporter to read back your last answer.

(The reporter read the last answer of the witness.)

By Mr. Rauh:

Q. Now since you didn't have other specific information, what was your basis for calling him; the other one?

A. The fact he was employed on the Editorial side of the New York Times and we had evidence respecting communist infiltration on that side. I think we could have called anyone on the editorial side of the New York Times and asked them whether they had any knowledge of it.

Q. Did the committee authorize you to subpoena anyone else from the Times on the theory you have just stated?

A. I didn't ask the committee to authorize the subpoenaing of any one on the basis of that theory. We didn't have time to go at it that way, Mr. Rauh. I was trying to recommend to the committee only people that I thought might be in a position to give us useful information.

[Tr. 326] Q. But it is your testimony that you could have subpoenaed anybody on the editorial side of the New York Times because you knew there were some communists there; is that correct?

A. I think that is correct, yes sir.

Q. Did you ever discuss that principle with Senator or Chairman Eastland?

A. I have expounded my view on this general subject several times in the presence of various members of the committee. I have no distinct memory of having done so in the presence of Senator Eastland, but I think I have, and I have not discussed it with specific reference to the New York Times, in which any private conference was had with Senator Eastland.

Q. Did Senator Eastland ever authorize you to utilize this theory in calling or subpoenaing witnesses?

A. Senator Eastland has never laid down to me rules with regard to choosing witnesses. I have made him recommendations. There have been occasions when he has asked, "Why do you want this one?" or "Why do you want that one?" But he has never laid down a general theory of rules under which I must make recommendations.

Q. I believe, Mr. Sourwine, you identified government exhibit eleven as the testimony of Matilda Landsman in executive session, the day before Shelton testified in executive [Tr. 327] session, the day before Shelton testified in executive session; is that correct?

A. December sixth. It would have been, yes sir.

Q. Now would you look through there and see if you can find the name of either Willard or Robert Shelton in that document?

A. Yes sir, I will.

The Court: While the witness is looking at the record, would you gentlemen come up here?

(AT THE BENCH:)

The Court: I told you gentlemen yesterday that we wouldn't sit tomorrow, but I am going to sit tomorrow.

Mr. Rauh: You have changed your mind?

The Court: Yes. This is a committee that comes into

Washington to get together and meet, and certainly I am not indispensable to them. So rather than to interfere with this trial we will sit tomorrow.

The Court does not care to ask any questions, but the Court would like to have the matter gone into. As the Court understands it, Mr. Burdett testified, and he testified as to an alleged communist infiltration into the media of News?

Mr. Rauh: Yes, your Honor.

[Tr. 328] The Court: And subsequent to that the Chairman of the Committee authorized the subpoenaing of eighteen witnesses?

Mr. Rauh: I think more than that. I think on the Executive Session there were thirty-eight. I will bring that out, your Honor. But there were eighteen at the open session. You are correct.

The Court: Now the Court would like to know if any of those, or how many of those, if the witness can recall, were mentioned in Burdett's testimony, or in Landsman's testimony, or in letters received by the Committee, or whether they were merely chosen as representing the News industry, whether it be from the New York Times or from the Daily News or from other news.

Mr. Rauh: I will try to bring that out, sir.

The Court: Now what time do you want to stop?

Mr. Rauh: It is up to your Honor. As early as you want to start in the morning.

The Court: I say, to discontinue? Pick out a good time to stop.

Mr. Rauh: As soon as I finish with this document why don't we stop?

The Court: All right.

[Tr. 329] (IN OPEN COURT:)

The Witness: I have read this transcript, Mr. Rauh. I do not find the names of either of the two gentlemen you mentioned.

By Mr. Rauh:

Q. There is in there questions by you asking Matilda Landsman about practically every other person who was called at the open or closed session, is there not?

A. I don't know that to be true. The record itself will show the names of the persons about whom I asked her and the list of people called.

Q. Will you please look through this and tell me if you did not ask Matilda Landsman about practically every other witness who appeared in executive or open session other than Shelton?

Mr. Rauh: I am perfectly willing to let that go for tonight. I would like to clear up the other point that you raised right now. I can do that with two questions. I can leave Mr. Sourwine with Exhibit Eleven. He can answer the question in the morning.

The Court: All right.

The Witness: I can answer it now. The answer is no, it did not.

[Tr. 330] By Mr. Rauh:

Q. Mr. Sourwine, you testified at the last trial, as follows:

"Question: did the committee——

Mr. Hitz: The page?

Mr. Rauh: Page 155 of the transcript of the record; in the Supreme Court record.

"Question. Did the committee call the past and present New York Times employees before it in these Executive and open sessions because it believed there was a high percentage of ex-communists on the Times?

"Answer. No, sir.

"Question. It did not believe there was a high percentage?

"Answer. That is not what I said, Mr. Rauh, and you know it.

"Question. I will repeat the question: did the committee call the past and present New York Times employees before it in these executive and open sessions because it believed there was a high percentage of ex-communists on the Times?

"Answer. No. The committee called these people

[Tr. 331] before it because it had information that the persons whom they called were in a position to give the committee information about the matter it was investigating."

Were your answers then true and correct?

A. Yes, sir.

Mr. Rauh: We can stop until tomorrow morning.

The Court: We will adjourn at this time until ten o'clock—or ten fifteen o'clock tomorrow morning. Not ten o'clock. Ten-fifteen.

(Whereupon, at 4:48 o'clock p.m., a recess was taken until the following morning, January 17, 1963, at 10:15 o'clock a.m.)

[Tr. 334]

PROCEEDINGS

The Court: You may proceed.

Whereupon JULIEN G. SOURWINE called as a witness by the government, having been previously duly sworn, resumed the stand and testified further as follows:

The Witness: Your Honor, if the Court will permit, I should like to make a correction with respect to testimony which I gave yesterday in one respect.

The Court: You may.

The Witness: May I explain that during the effort to fix the date on which a certain document was disposed of, namely this letter, I first gave my best estimate of the length of time it was ago, and I later made an effort, through telephone calls, to find the time of my point of reference, which had been mentioned here. That was the time when we moved to the New Senate Office Building. I was informed by my office that the Rules Committee had given the date of the move as September 17th, 1958, and although that was somewhat earlier than my recollection, I accepted that, and on the basis of that point of reference I testified yesterday that a letter had been disposed of during the last quarter of 1958 or early, very early 1959. It still bothered me and I went

further with it, and I [Tr. 335] have discovered, since leaving the stand yesterday, that our committee actually moved in late March 1959; that is, we began our move then, and the records of the telephone company, I am informed, show that my telephone was installed April 13th, 1959, in the new office. I know I did not occupy that office prior to the installation of the telephone. I came in the day the men were testing it. I can therefore say now that the date of disposal of this letter was within a ninety-day period after April 13th, 1959. Roughly it would be fair to say it was in the second quarter of 1959.

The Court: You may proceed.

Cross-examination. (Continued)

By Mr. Rauh:

Q. Mr. Sourwine, did I understand you to say just now that you had checked on the date of moving before your testimony?

A. No, sir; after the point came up and after I had given my point of reference in testifying that it was right after the move and in connection with the move, I then made an effort, during the noon recess, as I remember it, to find out when that move had in fact occurred, and I was told what I've said here this morning that the move was in September. It appears that was when the first occupant moved into the new building, and we were not among the first, and I finally secured the information [Tr. 336] I now have respecting the telephone hook-up, which is a definite point of reference, and dating it from that I can now say it was within the ninety-day period from the 17th of April '59, from and after that.

Q. Mr. Sourwine, is there any document in existence delegating the authority of the Committee on the Judiciary to the Internal Security Subcommittee?

A. I think the minutes of the Judiciary Committee might be regarded in that way. I am sure the minutes show this.

Q. What minutes are you referring to?

A. The minutes, of course, are not themselves a document doing the delegation but they are the minutes which would show it.

Q. What minutes show the delegation, Mr. Sourwine?

A. I am unable to give the date, but I am sure that there exist in the Judiciary Committee Minutes reference to the action of the Judiciary Committee in this regard.

Q. That's not what I asked you.

Is there anything in the minutes that says the Committee on the Judiciary hereby delegates its authority under S-Res. 366 to the Internal Security Subcommittee, or anything like that?

A. I think there's something in there like that; yes. [Tr. 337] I think there is a minute which authorizes this subcommittee to proceed under the jurisdiction conferred on the full committee by S-Res. 366, which was our basic authority.

May I say this, sir, to clear this up—I have never seen this minute. I do not keep the minutes of the Judiciary Committee, but I know that this happened, and knowing that minutes are kept I am satisfied in my mind that there is a minute to cover this action.

Mr. Rauh: May I have Exhibit Number 3, please.

(The exhibit was handed to defense counsel.)

By Mr. Rauh:

Q. I show you Government's Exhibit Number 3 and ask you whether this is the document you are referring to or whether there is any more delegation than that, if that can be called a delegation?

A. I don't assume that you are asking me for an opinion as to whether this can be called a delegation?

Q. No; I am not. I am asking you whether there are any more documents in existence that would operate as a delegation other than this one?

A. I can only express an opinion on that. My opinion is that there are. My opinion is that there must be in the minutes of the committee a record of the action taken in delegating [Tr. 338] to this committee, the Internal Security Subcommittee, the functions given to the full committee under S-Res. 366. That would have been done in due course

at the time of the appointment of initial composition of the Internal Security Subcommittee.

Q. This was done each two-year period, Mr. Sourwine?

A. I think after the initial composition of the committee it was probably done in the form of the minute which you have a certified copy of here; that is, the exhibit that you just handed me. That would have been the due course of the matter.

Q. Now you say there is in existence a delegation of authority more specific than the one you have before you delegating the power under S. 366 from the Judiciary Committee to the Internal Security Subcommittee?

A. No; I didn't say that.

Q. Well, tell me what you said?

A. I said I believe that there must be in existence a minute reflecting the Judiciary Committee action in that regard. I know that the Judiciary Committee did approve the appointment by the Chairman of the Internal Security Subcommittee, as initially composed, to exercise the powers and duties and responsibilities conveyed on the full committee under S-Res. 366, and I can't imagine that there is not a minute to cover that, but I can't testify that there is because, as I say, I don't keep them or [Tr. 339] dictate them, and I did the best I can.

Q. Would there be anything confidential about such a minute?

A. The minutes of the Judiciary Committee in executive session are all confidential; yes. I wouldn't think you would have any more problem getting that than you had getting this.

Q. After the recess will you please inquire and let me know whether you will produce that document, Mr. Sourwine?

A. Mr. Joseph Davis is the Clerk of the Judiciary Committee, sir. They are in his custody. If it is to be produced he will have to produce it. I'll be glad to convey to him your desire to have it.

Will that be satisfactory?

Mr. Rauh: No. Your Honor, will you direct this witness to inquire at the recess as to the existence of the minute he referred to and to bring it back with him after the recess?

The Court: All right. The Court understands from the witness' testimony that he is not the person in authority. The Court, however, will request that the witness make the oral request of the person who is designated as the custodian of those particular minutes.

The Witness: I will be very glad to do this, Your Honor. If the Court would desire to recess long enough to make [Tr. 340] a phone call, I can initiate a search of those minutes now, and perhaps facilitate the production of it at noon.

Mr. Rauh: Well, we will go on and you can get it later.

By Mr. Rauh:

Q. Do you recall testifying at the last hearing, the question and answer as follows: "Question . . ."

Mr. Hitz: Would you give me the page, please.

Mr. Rauh: One thirty seven.

The Witness: What hearing do you mean, sir?

Mr. Rauh: The trial the last time.

By Mr. Rauh:

Q. Do you recall the following under your cross-examination the last time?

"Question: There is no document that shows the conveyance?

"Answer: I do not know of a document which in terms sets forth the action of the Judiciary Committee in conveying this authority to the Internal Security Subcommittee.

Do you want to change your testimony on whether there is such a minute or not?

A. I see no conflict between what you've just read and what I told you this morning, sir. There is nothing I want to change there.

[Tr. 341] Q. Do you want to explain your previous statement that there was no document in existence on this?

A. Sir, the statement you've just read is not a statement that there is no such document; it is a statement that I don't know of such a document, and I have said that same thing again this morning, sir. I've said that I believe there must be one, and again I have made the distinction this morning that the document that I'm referring to would be a document showing action by the Judiciary Committee. It would not be a document which itself was a conveyance of power.

Q. You will try to produce that document?

A. I will indeed, sir, make the full compliance with the Court's request.

Q. Mr. Sourwine, you testified under my cross-examination at the last trial that thirty of the thirty-eight people called before the executive session were in some way or had been connected with the New York Times, is that correct?

Mr. Hitz: Would you give me the page, please?

The Witness: I'm not—

Mr. Rauh: I am not referring now—I am not quoting from a page.

The Witness: I am not sure that is correct, sir.

By Mr. Rauh:

Q. Could you tell me—

[Tr. 342] A. My best recollection of what happened is that I offered to make a count and the conclusion was that a count was not necessary and that I agreed that it was approximately thirty out of thirty-eight. I don't think I have ever made that specific count.

Q. Well now it's your testimony now that approximately thirty or thirty-eight witnesses called at the executive session were or had been connected with the New York Times?

A. No, sir; that's not my testimony now. I have less actual memory now than I had at that time and I would still say I will make a count. It's a fairly simple thing to do. If it is important, I can make the count and find out.

Mr. Rauh: I ask the witness be instructed to make a count at the recess and tell us how many of the witnesses at

the executive session were or had been connected with the New York Times.

The Court: All right, he said he would do it gladly. He said it would be simple. Is that correct?

The Witness: Yes, sir; I think it can be done in forty-five minutes.

The Court: All right.

By Mr. Rauh:

Q. And how many at the open hearing, Mr. Sourwine, were [Tr. 343] connected with the New York Times?

A. I don't remember the precise number now, sir.

Q. Did you testify at the last hearing that there were fifteen out of eighteen?

A. I don't remember that testimony. If I gave that testimony, it was true.

Q. Well, then, I will read it to you.

The Court: The page?

The Witness: You might let me see it, Mr. Rauh, and then I would be sure what it says.

By Mr. Rauh:

Q. Mr. Sourwine, did you ever hold a hearing into the Institute of Pacific Relations?

A. The Internal Security Subcommittee held such a hearing; yes, sir.

Q. Were you the interrogator?

A. I was an interrogator.

Q. And wasn't the complaint of the Institute of Pacific Relations that you would never show them a document until you questioned them about it? Was that correct?

A. I don't remember this, sir.

Q. You don't remember that at all?

A. No, sir.

[Tr. 344] Q. Even though it was a personal criticism of you, you don't remember it?

A. No; I don't remember this. It's entirely possible that this criticism——

Q. I'll do you the courtesy you do not do witnesses before your committee and show you this document.

The Court: Wait just a moment.

The Witness: If the Court please, may I say one thing? The record we are talking about here is a record of my testimony. I do not have a recollection now of ever having been criticized in a hearing of the Internal Security Subcommittee for refusing to let a witness see a copy of his own testimony. It may have occurred, Your Honor, but I have no recollection of it.

What portion of this do you want me to read, Mr. Rauh?

By Mr. Rauh:

Q. You might as well read a good part of it now and you can refresh your recollection and I will point to it.

A. Yes, sir.

Mr. Hitz: Mr. Rauh, will you advise me of the page that you are pointing out to him?

Mr. Rauh: One forty-eight and one forty-nine.

The Witness: Now, beginning at the point you have [Tr. 345] marked:

"By Mr. Rauh:

"Question: How many persons were called in open session January 4th, 5th and 6th, 1956?

"Answer: Eighteen, sir.

"Question: And how many of these were past or present members of the New York Times?

"Answer: I would have to refresh myself by examining the testimony of each witness. Do you wish to have me do that?

"Question: I do, but I have prepared a chart which I will show you and ask you if that helps you with this?

"Answer: This whole thing is in evidence, isn't it, Mr. Rauh.

"Mr. Hitz: It is, Mr. Sourwine.

"Question: Does this in any way help you to answer

the question: How many of the eighteen were past or present employees of the New York Times?

"Answer: Yes, it does. Let me read it further.

Yes, sir, it refreshes my recollection, and I would say that what you have here is probably substantially correct. It shows one, two, three, four, five, six, seven, eight, nine, ten, eleven—it shows eleven of those as present [Tr. 346] Times affiliation; that is, in the column which you have headed "Times Affiliation," you have the word "present" eleven times and "former" three times. I think there may be a technical error in one of those names. I think one of the persons you marked "present" may have testified that he had just terminated his employment.

"Question: I think that is correct.

"Answer: I think he indicated that he felt it was as a result of being called in this hearing or the consultation he had with his employer as a result he had of being called.

"Question: I think that is correct, and we included him as "present" because he had been present at the time of the initiation of the investigation. So that is a fact, then, that fourteen out of eighteen of the persons called in the investigation publicly were present or past employees of the New York Times?

"Answer: Yes, I think that is true.

"Question: And isn't it a fact that the fifteenth was a brother of an employee of the New York Times?

"Answer: Yes, sir. You are referring to Mr. Fine, the exhibitor of Artkino pictures."

And that's the point you marked for me to stop.

[Tr. 347] By Mr. Rauh:

Q. Is that testimony you gave the last time true and correct?

A. I am sure it was.

Q. Are you sure that it is?

A. Well, I am less sure now of the facts than I would have

been then, but I am quite sure now that I didn't lie to you then.

Is that what you mean, Mr. Rauh? It is obvious from that testimony that I didn't accurately remember of my own recollection. I accepted your chart figures as accurate on the basis of my best recollection. I was willing to say they were probably correct. I'm willing now to say that the figures in that chart were probably correct.

Q. Mr. Sourwine, yesterday you said I was wrong in characterizing your testimony as saying you had directed the destruction of the so-called letter. You said that it meant that I was wrong and that you had only permitted it. I would like to get the record straight on this point.

Will you describe exactly how the document came to be destroyed?

A. Yes, and I might say I had no intention of quibbling with you about the word "directed." I am perhaps over-precise [Tr. 348] with words. Direct to me means to give somebody an immediate order to do something. I am aware it may have a broader connotation. Here is what happened in this regard. This letter was one of a group of letters from the same writer. In connection with a review of a number of documents for the purpose of eliminating those which were obsolete or had served their purpose and need no longer be kept, or kept in the place they then were, I removed this batch of letters from where they were and put them over in a basket of material which I knew was to be disposed of. That's what happened.

Q. Do you describe that as permitting it to be destroyed, Mr. Sourwine?

A. I did so describe it, but I say I had no intention to quibble.

Q. Wasn't it a fact you destroyed this letter, Mr. Sourwine?

A. I personally?

Q. Isn't it a fact that you caused the destruction of this letter, Mr. Sourwine?

A. Oh, yes; there is no doubt I caused it.

Q. Did you discuss your testimony with anybody last night, Mr. Sourwine?

A. Yes, sir.

[Tr. 349] Q. With whom?

A. Mr. Hitz.

Q. Did you discuss it with anybody else?

A. No, sir; I did not.

Q. What did you say to Mr. Hitz, and what did he say to you?

Mr. Hitz: I object.

Mr. Rauh: There is no lawyer-client relationship here whatever. Mr. Hitz is not Mr. Sourwine's lawyer. I am entitled to have this.

Mr. Hitz: There is no relevancy either.

Mr. Rauh: The whole question in this case is Mr. Sourwine's credibility; it's been from the first. I would like to know what the discussion was last night.

The Court: All right, you can explain the contents of the discussion you had with Mr. Hitz.

The Witness: Well, as best I can recall it, we went from—oh, I think I went to Mr. Hitz' office to get my coat. I went out of here just a little bit angry because I had a luncheon appointment today. I had been informed by Mr. Hitz that he understood the Court was not sitting today and I had done nothing to postpone it, and when I heard we were to come in this morning, I spoke to Mr. Hitz here in the courtroom after the [Tr. 350] Court adjourned and asked him if he had conveyed to the Court the fact that I did have, and he said he had not, but something to the effect that he could do it, and I said no I would postpone the appointment, and I was afraid I was a little brusque about it and I went to his office to get my coat and hat, and he came down as I was leaving his office and I apologized to him for any brusqueness in my voice and said something to the effect I understood how things like that could happen. And then I asked Mr. Hitz—

Mr. Hitz: Your Honor, I am going to object to this for the lack of relevancy. Now many things transpired yesterday afternoon, and I don't think Mr. Rauh is entitled to know all of what they were. They transpired between me and Mr. Sourwine, between me and my superior, Mr. Acheson, who came into my office. I had a talk with Mr. Acheson.

I came back and talked to Mr. Sourwine, largely about what Mr. Acheson told me. If Mr. Rauh is intending to try to find out whether I influenced the future testimony of this witness, I think he should be more direct, but to ask him everything that transpired between Mr. Sourwine and me, and indirectly with Mr. Acheson, I don't think has anything to do with this trial and is a violation of public confidence.

Mr. Rauh: I will withdraw any question relating to [Tr. 351] Mr. Acheson. Any discussion that Mr. Acheson was in on, I withdraw. This is the question between Mr. Hitz and Mr. Sourwine, what the discussion was. If there was any relationship to anything Mr. Hitz' superior may have said, I do not ask for that. I ask for the rest of it going to the credibility of this witness.

Mr. Hitz: I don't think the broad question, even so limited now, is a proper one under these circumstances. If he has any idea of influence, he should ask those questions and he will get the answers.

The Court: Would you gentlemen come up here.

(AT THE BENCH:)

The Court: What is your proffer?

Mr. Rauh: Through him?

The Court: Yes.

Mr. Rauh: They have been changing this story about the letter since it first came in, Your Honor. I am trying to prove there was no letter.

The Court: Wait just a moment now. And that Mr. Hitz is the one that has changed?

Mr. Rauh: Mr. Hitz has been in on it. Mr. Hitz knew on Tuesday when I made my opening and was talking about this letter that it had been destroyed, and instead of getting [Tr. 352] up and saying it had been destroyed, he got up and said I don't know whether we are going to produce this letter or not; I am not going to tell him.

Mr. Hitz: I didn't say that.

Mr. Rauh: He knew he couldn't produce it. I can get the record to show what you said.

Mr. Hitz: I said I would not make my position at that time; no.

Mr. Rauh: Well, let's have the record show exactly what Mr. Hitz did say at that time after I made the charge on this letter. Let's have it on the record what Mr. Hitz said to mislead me about whether this letter was in existence or not, when he knew again for three days it was in existence.

Mr. Hitz: Your language is very loose and I don't like it. You said something about unethical to this Court twice yesterday and today about misleading. I don't like that and I am saying it on this record in the presence of this Court.

Mr. Rauh: Well, I certainly feel that your conduct in coming out here and knowing that this document had been destroyed and not telling the defense was unethical.

Mr. Hitz: I am trying this case in the ordinary course. When this came up and became relevant, I revealed the substance of it. I do not have to tell you in my opening statement.

[Tr. 353] The Court: So far as the Court is concerned this is an unusual situation where counsel says, what was the conversation, what happened between you and the witness; that is, in this particular phase of it. Now if you have a proffer, if you have some relevancy to the issue that we are concerned with, the Court will be glad to listen to you.

Mr. Rauh: I offer to prove that they, based on my only—I wasn't there—I don't have bugging devices—I was not there, but I say if they talked about this case they talked about the fact that Mr. Sourwine had destroyed a relevant document. I do not know what will come out of that conversation, but their discussion of Mr. Sourwine's destruction of a relevant document, I think, would be likely to be helpful on the question whether there ever was such a document. Mr. Sourwine is a lawyer. He and another lawyer were discussing the fact that Mr. Sourwine had maybe committed a crime. I have been looking at this. Mr. Sourwine—the destruction of this document may be a criminal act. It may also be contemptuous of the Court of Appeals.

The Court: Wait just a moment.

Mr. Rauh: Now if they were to—

Mr. Hitz: I must interrupt Mr. Rauh. I don't see any purpose in having a bench conference if it is said loud

[Tr. 354] enough, and designed to be loud enough for Mr. Rauh to be heard, and now he's looking right at the press.

Mr. Rauh: I don't know if there is any press here.

Mr. Hitz: He is not talking to the Court at all.

Mr. Rauh: I must say I find it strange that Mr. Hitz would try to hide a conversation he had.

Mr. Hitz: Your Honor, I think it is time that counsel is cautioned about this.

The Court: I think so too. This Court has tried, and will continue to try, but this Court does not appreciate your going to the press bench and sitting on their desk and making side remarks. They are intelligent people. They will report this case as they see it, but during the course of the trial, and this Court has not mentioned it, but this Court does not appreciate that. This is an action that this Court is very desirous of seeing that Mr. Shelton be given a fair trial in every sense of the word. Now the Court has asked you to make the proffer on the relevancy of a discussion between Mr. Hitz and Mr. Sourwine.

Mr. Rauh: My proffer is it goes to Mr. Sourwine's credibility, what they discussed about his testimony yesterday and the testimony he was to give today. I say that goes to his credibility.

[Tr. 355] The Court: And confined to that?

Mr. Rauh: Yes, sir.

The Court: All right.

Mr. Hitz: And my objection is that no rule of evidence permits and requires it. I am not trying to hide anything but I think cases should be tried on the rules of evidence. Now if any communications were had, and this will be an example of what I mean, between Mr. Sourwine and me in writing, let us say, there is no Jencks rule, there is no Jencks law, there is no rule of evidence at common law or at statutory law that would permit that to be shown to Mr. Rauh for exploration unless he has something in particular in mind that he can ask direct questions upon, and just because the communications were orally mentioned does not justify a complete relation of them here. There is nothing being hidden. There is no rule of evidence behind Mr. Rauh's request. That is what I'm talking about.

The Court: All right, the witness will answer the question. The objection will be overruled.

(In open court:)

The Court: All right, Mr. Rauh.

By Mr. Rauh:

Q. Continue your conversation with Mr. Hitz and omit any reference to things stated that Mr. Acheson had said.

[Tr. 356] A. All right, sir. I then asked Mr. Hitz, as I recall it, whether in his judgment the degree of accusation you had hurled at me in the courtroom was justified.

Mr. Hitz: Mr. Sourwine, will you talk up. I can't hear you.

The witness: I am sorry. (Continuing) Whether the degree of accusation that you, Mr. Rauh, had hurled at me in the courtroom was justified, and as I remember it, Mr. Hitz expressed his view that it was not. Then Mr. Hitz took me to task for—perhaps that language is too strong—I can tell almost exactly what he said. He said I had used the word "discuss" in my testimony with respect to when I conveyed first any information respecting the disposal of this letter to the Office of The United States Attorney, and he pointed out to me that there wasn't any discussion, which I had to admit was true. There had been a question and an answer. About that time Mr. Hitz was called out of his office. I don't know where he went. I asked him if I might use his phone during his absence, and I did use it. I made several personal phone calls. Then Mr. Hitz came back to his office. He had just gotten back when his, the young lady in the outer office came in and said that Mr. Acheson wanted to see him definitely before he left, and Mr. Hitz suggested to me that if I wanted to have something to occupy my time [Tr. 357] while he was in Mr. Acheson's office I could read a transcript, and he left and said he would be back within fifteen minutes. He was, I think, back within less than fifteen minutes. I recall no other conversation bearing in any way upon my testimony that did not concern Mr. Acheson or what had taken place in Mr. Acheson's office.

By Mr. Rauh:

Q. Is that all, Mr. Sourwine?

A. Yes, sir. I recognize, Mr. Rauh, the possibility that as in any attempt to summarize even a recent conversation, it is possible that I have left something out, but I do not intend to do so. I don't think I have, and I would be glad to answer any questions you have about it.

Q. The only part I would like you to elaborate is the question you asked Mr. Hitz and his answer about whether I had been unfair in accusing you of destroying a document.

Would you say how you put it and how he put the answer, please?

A. Yes; as near as I can. I am not sure this is the precise words but this is certainly the substance of it. I said to Mr. Hitz, "Rauh has been practically accusing me of crimes in the category in open court. Do you think there is any justification for that?" Mr. Hitz said, approximately, "Of [Tr. 358] course not, there's nothing to it."

Q. Mr. Hitz said there was nothing to your having destroyed this document? He didn't think that was important? Is that what you are telling this Court?

A. It wasn't discussed in that particular frame of reference, sir. There was no greater discussion about that matter than I have told you. It was my question. I was somewhat annoyed, I will admit, at the aspersions I thought you were casting upon me yesterday, and I expressed this to Mr. Hitz by asking him if he thought there was any justification for treating me that way. He said substantially, "Of course not, there's nothing to it."

The Court: That is the evaluation of the characterization of your testimony by Mr. Hitz?

The Witness: I took it to be that; yes, sir.

The Court: All right.

The Witness: That is, Mr. Hitz was evaluating the characterizations that Mr. Rauh had made.

By Mr. Rauh:

Q. This document that you testified this morning that you caused to be destroyed was destroyed in the second quarter of 1959, is that correct?

A. I think so, sir. I have testified it was in the ninety [Tr. 359] days after April 17th. I think that to be true.

Q. And did you then know that this case was before the United States Court of Appeals in this building?

A. As I said when you asked a similar question before, sir, I am sure that I was aware of the fact that the case had gone up on appeal, and of course I know where the court sits, but I don't want my answer to show that I had that fact in my mind in juxtaposition with the action taken at the time with respect to this packet of letters, because, as I testified, I didn't.

Q. Were you aware, Mr. Sourwine, that the issue of credibility had been raised concerning whether there was a letter which you now claim was destroyed?

Were you aware that the issue of credibility had been raised on the existence of that letter?

A. I don't think so. I have no present recollection of having been aware of that issue being raised until we got here and you raised it here in my hearing. I don't think that was raised at the prior trial. If it was, it didn't impress itself on me so that I would remember it now.

Q. You don't remember the issue of credibility being raised at the prior trial on this letter, is that correct?

A. There was a letter—

Q. You don't remember it?

[Tr. 360] A. No, sir; I remember now quite clearly that an effort was made to get this letter at the prior trial and that the Court overruled the effort, denied that effort, and I think my justified assumption was that you wouldn't be trying to get something that you contended didn't exist. I don't understand now that you contended at the previous trial that the letter didn't exist. If you did, I will stand corrected.

Q. Did you understand that I questioned your credibility on the contents of the letter, Mr. Sourwine?

A. Sir, I understood that it was your purpose to make a

record that you were questioning my credibility wherever you could; yes, sir.

Q. That is not my question. My question is, whether it is your recollection that at the first trial I questioned your credibility on the contents of this letter?

A. I think that's correct.

Q. So you destroyed a letter on which I had at the first trial questioned your credibility on its contents, is that correct?

A. I don't mean to quibble. In using the word "destroyed" as embracing the cause to be destroyed, that is correct; yes.

Q. You testified at the first trial, Mr. Sourwine that you and Mr. Morris referred to this confidential informant as "X", [Tr. 361] is that correct?

A. I certainly sometimes did; yes, sir.

Q. What else did you call him, if you sometimes called him "X"?

A. Well, I am quite sure you are not going to believe me, but I have been trying to recall that pseudonym and I can't bring it to mind. I don't believe I ever testified to it, and I cannot—I just cannot recall it. It was a two-syllable name which he used to sign the letters with, and I honestly can't recall it.

Mr. Hitz: Pardon me. Your Honor, I wonder if I could ask your permission to ask the Reporter to mark his notes here, because before I examine Mr. Sourwine again I am going to ask something to be read. At that time if we look back for it it might take some little time. Might I ask permission for him to do that?

The Court: All right.

Mr. Hitz: The second or third answer back I am going to ask you to read to me at a later time.

(The Reporter complied.)

Excuse me, Mr. Rauh.

By Mr. Rauh:

Q. That was a two-syllable name, did you say?

[Tr. 362] A. That's my present recollection; yes.

Q. All you can remember about the name on the basis of what you called Mr. Shelton was that it was a two-syllable name, nothing else?

A. Well, you put something else in the question again, Mr. Rauh. I believe I have already testified—first, and this I think serves your purposes, that the only information that we had at the time the subpoena was issued, the subpoena which erroneously and through error carried the Willard—that's the first name—was information obtained from the so-called pseudonym letter in the area of Mr. Shelton's connection with a Communist group on the New York Times, but I think I have also testified that there was other basis for calling. Now, I'm not trying to withhold the facts from you, and I will be perfectly willing to concede here that he probably would not have been called; that is, we would not have sought to secure the testimony of the Shelton who worked on the news side of the New York Times if we had not received information from this informant that there was such a Shelton and that he was connected with a Communist group on the Times and should be able to give us information. Now that is the state of the facts.

Q. In other words, you called him because you claim he got this letter, isn't that right?

[Tr. 363] A. I claim I called him because we got this letter; yes, sir. I will accept that.

Q. Does the FBI have a copy of this letter, Mr. Sourwine, the one that you destroyed?

A. Not unless it was given to them by the writer.

Q. You didn't give them one?

A. Mr. Rauh, before it escapes me, the name I have been trying to get for two days has just come to my mind.

Q. Well, let's have it.

A. The pseudonym was Finbar.

Q. How do you spell it?

A. F-I-N-B-A-R—and I can't tell you its origin. I haven't the slightest idea.

Now, I am sorry, I lost the thread of your last question. I didn't mean not to answer.

Q. My last question was, you did not then give a copy yourself to the FBI of the alleged letter?

A. I did not.

Q. Did you ever ask Mr. Morris what Finbar stood for?

A. No; I never did.

Mr. Hitz: I didn't get the question. Mr. Reporter?

The Witness: He wanted to know if I ever asked Mr. Morris what Finbar stood for, as I understand it.

[Tr. 364] The Court: That is right.

The Witness: And I answered, "No, I never did."

Let me explain that, Mr. Rauh. Judge Morris had letters from Finbar. I didn't know he had them. When I took over, Judge Morris, in connection with turning things over, gave me some of these letters—whether they were all he had, I don't know—and told me that this was a person known to him as a reliable informant, and that hereafter the letters would come to me, and they did. I never asked the origin, how it was made up or anything about it.

By Mr. Rauh:

Q. Is this correct, Mr. Sourwine, that you testified yesterday that you told Mr. Halleck, when he told you there was no Willard Shelton but that there was a Robert Shelton—is it correct that you said to Mr. Halleck, "It's obvious he's the man we want because he's the only Shelton on the news side."?

Did you say that yesterday?

A. Well, I conveyed that to him. I am not sure that I said exactly those words. Now the information as conveyed back and forth, and I am not attempting to reconstruct actual words, was this: Mr. Halleck conveyed to me that there was no Willard Shelton on the New York Times, that there was only one Shelton on the news side of the New York Times, and that he was Robert Shelton, and I conveyed to Mr. [Tr. 365] Halleck that obviously since we knew we wanted a Shelton who was on the news side of the New York Times, the only Shelton there must be the man we want.

Q. Well, did you or didn't you yesterday say that you had told Mr. Halleck, "It's obvious he's the man we want."?

Did you say it yesterday or didn't you?

A. I'm sure if that's what the record reads, I said it; yes, sir, but what I'm saying now, Mr. Rauh, is that I was not then attempting to quote myself verbatim, and I can't quote verbatim. I did tell him this, but the precise words in which I told him, I don't recall.

Q. Now the day on which you said imprecisely that it's obvious he's the man we want, was November 16, 1955, is that correct?

A. Sir, I can't tell you now whether that is the precise date. I think that is correct.

Q. It was within a day or two—

A. It was the 15th or the 16th, and I believe it's the 16th.

Q. All right, on November 16 you said to Mr. Halleck words to the general effect that it's obvious he's the man we want, correct?

A. Yes, sir.

[Tr. 366] Q. Why is it, then, on December 7th at the hearing you said to Mr. Shelton, when he refused to answer the first question, and I quote you: "I will state, Mr. Chairman . . ."

Mr. Hitz: What page?

Mr. Rauh: Fifty-six. (Reading)

"I will state, Mr. Chairman, I am greatly surprised. I did not expect this. We came into this as I explained to the Senators and to put on the record to clear up a question of identity. The record will show that the witness was not charged with being a Communist . . ."

I ask you now to explain how it was obvious this was the man you wanted on November 16th, and you were surprised on December 7th, three weeks later?

The Witness: Well, this is very simple, sir. It's the case of the use of a phrase in two different connotations. I can explain this from the beginning, I think, and make it quite clear.

My intention from the beginning was to recommend to

the Chairman the subpoena and the questioning of a man named Shelton whom we had been informed was employed on the news side of the New York Times and had information that would be useful to the committee. There was an error with respect to putting the first name of that Shelton on the list of witnesses and on [Tr. 367] the subpoena which thereafter was made up, the first subpoena. This didn't change my intent. By that time I had become accustomed to the word, to the name Willard. I had accepted it as the correct first name of the man we wanted to get to testify, the man we wanted in the sense of wanted for the purposes of getting his testimony. I learned from Mr. Halleck that obviously there had been an error in the name and that the man we wanted was not Willard but Robert, and I conveyed that to him.

Then at the hearing, I think you will probably find at the executive hearing and perhaps again at the public hearing, but certainly at the executive hearing the phrase "the man we wanted" is used more than once.

Here was the situation: I had leads respecting the existence of several individuals bearing the name Shelton as the surname, and we wanted to clear up the question of identity as to whether this man was any of those individuals, whether there was any continuity of Communist connection that could be established. There was also the question as to whether this was in fact as had been reported to us a man who could give us useful information. Mr. Shelton's demeanor was forthright and convincing to me, as the interrogator. His answers successfully eliminated the possibility that he might be one of the other Sheltons known to have had Communist connections. I will put [Tr. 368] it another way: his answers made it clear to me and I was willing to accept that they were in fact other Sheltons and not him, and as a result of the answers, the way in which they were given, the elimination of these other leads, I was ready to accept, if I had not in fact accepted in my own mind, the idea that either the informant had been wrong, which I had a strong tendency to reject, because when a man has given accurate information over a long period of time you tend to think that what he tells you is accurate, or that somehow somebody else had

made another mistake, that perhaps Halleck had been wrong when he said this was the only Shelton; various possibilities, that there had been another one and he had left and this one had come in. I was ready to accept the fact that somehow this was not a man who could give us information, that we didn't really want or need his testimony, and it was only when we got a reply cast in a frame of reference, which I am accustomed to receiving from—to put it euphemistically and avoid offense—witnesses whom we do have good reason to believe can give us useful information in this area that I changed my mind about that. I was surprised.

By Mr. Rauh:

Q. What in Mr. Shelton's testimony prior to the time you said you were surprised caused you to believe that he was not [Tr. 369] the man in the letter?

You talked about all the other Sheltons. What was it in his testimony that made you surprised he was not the man in the letter, Mr. Sourwine?

A. Mr. Rauh, I can't point to a single thing in the testimony that brought me to that conclusion, but I can, I think, summarize for you what led me to that conclusion.

As I say, we had several other leads and we began by asking him about these, asking him questions which would indicate that he might or might not be in the area of one of the other Sheltons, and I am not wholly clear now on the details of how this was done, but generally I can tell you, and I know I explained it in detail at the last trial. He gave answers which seemed forthright and which I had no reason to disbelieve respecting where he had been at certain periods of time, what his employment had been—answers which were inconsistent with his being one or another of the Sheltons concerning whom we had leads. We asked him a question about the Newspaper Guild, his membership in the guild, and he was a member, and then we placed the date of it, and if I remember correctly we got rid of two of those leads there because one of the men had been in the guild but had been in it much earlier than Mr. Shelton testified he was in it, and I was perfectly willing to accept Mr. Shelton's [Tr. 370] testimony on that point for several reasons, because by his

demeanor and the way he gave his answers I had become convinced that he was telling us the truth. I had that feeling, because that's the kind of thing that a smart man, and Mr. Shelton obviously is a smart man, wouldn't lie about because it is easily susceptible of proof.

Q. Mr. Sourwine—

A. And after having eliminated these other leads, and having the feeling that Mr. Shelton was being frank with us, I had come to the point where I anticipated in my own mind that when he was asked about Communist Party membership and knowledge respecting Communist activities he would tell us he had never been connected with the party and had no such knowledge, and I was conditioned, if I may use the word, to accept that when it came about, and that's what raised the thought in my mind at that time that probably we would have to go further, this was not the man we wanted to get testimony from.

Q. Mr. Sourwine, I repeat, you have told us why the other leads were thrown out.

What in Mr. Shelton's testimony in any way caused you to think the Finbar lead was incorrect?

A. Well, Mr. Rauh, as I have said before, I think, the possibility that the Finbar lead might be incorrect crossed my [Tr. 371] mind. My tendency was to reject it. I did not reach the conclusion that it was wrong, but there did grow in my mind the conclusion that somehow this man was not the man we wanted, that if Finbar was right, even assuming he was right, there was a Shelton on the news side, we hadn't got that Shelton. I cannot point to a specific answer in his testimony that caused this. I arrived at the conclusion up until we got that question which surprised me. I had arrived in my mind that a conclusion that Mr. Shelton was just not the type of fellow, from what I observed him from the way he answered the questions, as much as from what he said. That's all I can tell you.

Q. All right, Mr. Sourwine, would you please read the testimony of Mr. Shelton at the executive hearing up until you asked him the Communist question on the bottom of page 52, and tell me one question that showed the lead was incorrect.

A. I will be glad to read this, sir, if you desire it, but I have already stated I cannot point to one question here and say that this showed that the lead was incorrect.

Q. Point to as many as you want or point to all of them if you want. Go ahead and read it.

A. I am not attempting to build a house of cards here out of one or two or three questions. I am trying to make it clear that I had arrived in my own mind at the feeling that this man [Tr. 372] really didn't have information that he could give us, that he was being frank with us; he appeared to be completely at ease; he didn't seem to be nervous; he didn't seem to be holding anything back; he didn't seem antagonistic. He gave evidence of full cooperation, and I saw none of the indicia of a witness who would have to be pried open to get information, and I simply had arrived at the tentative conclusion, if I hadn't actually concluded, that we were not going to get what we wanted from this man. Now I hadn't gone to the point of sitting down and saying, well now what does this mean, and how come we got him here at all if he isn't the man, and where could our man possibly be, but those things were certainly in the back of my mind. I had not reached the conclusion that the information was wrong. Certainly I was still—I would have been completely ready to accept an explanation consistent with the tip having been right; that is, Chuck Halleck could have been wrong. The man who gave him information about Sheltons on the Times could have been wrong. All I had done was to change my own mind about whether this was the particular Shelton who was going to be able to give us information if he wanted to.

Q. Now——

A. I am sure I will tell you the same thing after I've read it, but if you want it read I will be glad to read it.

[Tr. 373] Q. I would like you to read the two pages prior to the time you asked the first Communist question.

A. Yes.

Q. Stop any time you think there is a question that caused your surprise. Stop any time and say, "That's the question that caused my surprise."

A. You mean an answer, don't you?

Q. An answer.

A. Yes, sir.

The Court: All right, we will take ten minutes at this time.

(Short recess)

The Court: You may proceed.

By Mr. Rauh:

Q. The pending question is that Mr. Sourwine read the two pages of testimony by this defendant prior to the time that he asked him a question on Communism and point to any question, one or more, which led him to feel that they had the wrong man and that Finbar's tip was not this man.

The Court: If the witness is able to.

Mr. Rauh: If he is able, Your Honor.

The Witness: (Reading)

"Senator Hennings: You do solemnly swear that the [Tr. 374] testimony you are about to give at these hearings will be the truth, the whole truth and nothing but the truth, so help you God?

"Mr. Shelton: I do.

"Senator Hennings: Be seated, Mr. Shelton.

"Mr. Sourwine: Will you give the Reporter your full name, sir?

"Mr. Shelton: Robert Shelton.

"Mr. Sourwine: Do you have a middle name or initial?

"Mr. Shelton: No, I have not.

"Mr. Sourwine: And your address?

"Mr. Shelton: 191 Waverly Place, New York 14.

"Mr. Sourwine: And your business or profession?

"Mr. Shelton: I am a Copy Editor for the New York Times.

"Mr. Sourwine: You say a Copy Editor or the Copy Editor?

"Mr. Shelton: A Copy Editor.

"Mr. Sourwine: How many Copy Editors are there, sir?

"Mr. Shelton: Oh, I believe there are about 60.

"Mr. Sourwine: How long have you been employed there, Mr. Shelton?

"Mr. Shelton: It will be five years in February.

[Tr. 375] "Mr. Sourwine: Where did you work before that, sir?

"Mr. Shelton: Prior to that I worked with Fairchild Publications.

"Mr. Sourwine: For how long?

"Mr. Shelton: About three months.

"Mr. Sourwine: And before that?

"Mr. Shelton: I was not working in the newspaper field. I was working for a mail order house for a few months, prior to that unemployed, prior to that going to college.

"Mr. Sourwine: Are you a college graduate, sir?

"Mr. Shelton: Yes.

"Mr. Sourwine: What college?

"Mr. Shelton: Northwestern University.

"Mr. Sourwine: Your degree?

"Mr. Shelton: Bachelor of Science.

"Mr. Sourwine: You graduated in what year?

"Mr. Shelton: 1950.

"Mr. Sourwine: Where were you born?

"Mr. Shelton: Chicago, Illinois.

"Mr. Sourwine: Did you live there in Chicago before and after the time you graduated?

"Mr. Shelton: The last two years of college I resided [Tr. 376] in Evanston, Illinois, which is a suburb of Chicago.

"Mr. Sourwine: Were you at any time active in the Newspaper Guild?

"Mr. Shelton: Is that question pertinent to the scope of this inquiry?

"Mr. Sourwine: I may say what we are primarily doing here is clearing up a question of identity and one way to do that is to make the record clear about yourself and your own associations.

"Mr. Shelton: I understand that. That is a matter of

public record that I have been a member of the Newspaper Guild.

"Mr. Sourwine: For how long, sir?

"Mr. Shelton: Well, I joined the guild when I was at Fairchild Publications. That would be some time in the winter of 1950.

"Question: May I interrupt, Mr. Sourwine, please. It was stated two questions before that you——"

By Mr. Rauh:

Q. Now, wait a minute. You are now reading from Mr. Hitz' interruption, I believe.

Would you drop down? This is Mr. Hitz' at the last trial. [Tr. 377] A. I beg your pardon. (Continuing to read)

"Mr. Sourwine: For how long, sir?

"Mr. Shelton: Well, I joined the guild when I was at Fairchild Publications. That would be some time in the winter of 1950.

"Mr. Sourwine: You were not with the guild in 1947?

"Mr. Shelton: No, I was a college student then.

"Mr. Sourwine: Were you ever Washington correspondent for PM or in any way connected with PM?

"Mr. Shelton: No, sir."

Now if the Court please, neither of the two questions that I have just read, standing by itself, led me to the belief that Mr. Rauh has asked me about, nor did the two of them together constitute the reason for that belief, but both of them contributed, because one of the leads we had respecting a Shelton who had been connected with Communist activity concerned a man who had been in the Newspaper Guild specifically during the year 1947, and identification of Mr. Shelton with that man had been negated by his reply that he was not in the guild in 1947.

Another one of these Sheltons concerning whom we had information was, according to our information, a former Washington correspondent for PM, and we asked this Mr. Shelton if he was in any way connected with PM, and he [Tr. 378] said no,

Now I will continue: (Reading)

"You are not a member of the Communist Party and you never have been, is that right?"

Q. That's all, Mr. Sourwine.

A. Yes, sir.

Q. Are those the only two questions you care to rely on to explain your surprise?

A. This is not a matter of reliance, sir. I have mentioned other questions, but I'm not as clear in my mind now on exactly what the connection was. I told you about the guild thing.

Q. Was there anything in the letter from Finbar about the guild?

A. I don't believe there was. My memory is there was not.

Q. Was there anything in the Finbar letter about PM?

A. No; I don't believe there was, sir.

Q. And isn't it a fact that you were really after Willard Shelton that he was the man who had been on PM, Mr. Sourwine?

Isn't it a fact that Mr. Shelton, Willard Shelton, had been on PM?

A. I don't know that to be true. I believe it to be true. [Tr. 379] I've heard that that was true, but it is not the fact that he is the man we had in mind subpoenaing; no, sir, nor is he the man, Mr. Rauh—perhaps I shouldn't volunteer, but he is not the man who was in fact subpoenaed with a valid subpoena. That was Robert Shelton, the defendant here.

Q. At the recess did you inquire whether the minute that you referred to existed?

A. Yes; I did. I talked over the telephone with Mr. Joe Davis, the Clerk of the Committee on the Judiciary.

Q. Does it exist?

A. Mr. Davis tells me that there is no minute entry with respect to this matter, and it is evidenced by a copy of the notice which was sent to all members of the committee and

the full committee at the time of the appointment of the sub-committee. He tells me that was on January 16th, 1951.

Q. May we have that?

A. I have asked him to prepare a certification with respect to that notice to get it down here as rapidly as he can, and he said he would.

Q. Thank you.

A. That's the best I could do on Your Honor's request.

The Court: All right.

[Tr. 380] By Mr. Rauh:

Q. That is perfectly satisfactory.

With respect to the count of thirty persons, then or previously connected with the New York Times having been called at the executive session out of the total of thirty-eight, did you check that?

A. I am sorry, I did not. I talked only with Mr. Davis. I didn't even get to talk with anyone in my own office.

Q. Well, we'll have to do that a little later.

A. I will request that as soon as we go for the noon recess.

Q. We will do that at the noon hour.

Did you tell anyone that you had caused the destruction of the alleged letter prior to your reporting this to Mr. Hitz last Friday or Saturday?

A. No, sir.

Q. You never told Mister—anyone at the Justice Department?

A. No, sir.

Q. Did the Justice Department consult you at the time they were preparing their brief for the Supreme Court and relying upon the existence of this letter?

[Tr. 381] Mr. Hitz: Excuse me, I object to the question. It assumes a fact which not only is not in the case, but is not true; namely, the existence of the letter, relying upon the existence of the letter.

Mr. Rauh: Well, I shall read from the government's brief if Mr. Hitz wants to make that position. I have in front of me the government's brief reading as follows, in

the Supreme Court: "Subsequent to . . ."—page 5, signed Archibald Cox, Solicitor General. (Reading)

"Subsequent to Burdett's testimony the subcommittee received information that a man by the name of Shelton, said to be an employee on the editorial or news side of the New York Times, was a member of a Communist group among the staff of that organization, that he was active in the affairs of this group, and that he was in a position to furnish the subcommittee with information concerning Communist activity. R-4898116. The first name of the person identified as Shelton was not given, although this information came to the subcommittee in a letter signed with a pseudonym, the identity of the writer was known to the former associate counsel of the subcommittee, Robert Morris. R-99102191."

[Tr. 382] By Mr. Rauh:

Q. On the basis of this assertion in the government's brief, did they consult with you about the existence of the letter?

A. No one from the Department of Justice, or representing the department in any way, consulted with me in connection with their brief at all or in connection with the existence of the letter at all.

Q. To your knowledge did they consult with anybody on the committee?

A. Not to my knowledge, sir.

Q. Or the committee staff?

A. Not to my knowledge.

Mr. Rauh: I have no further questions.

The Court: All right.

Redirect examination.

By Mr. Hitz:

Q. Mr. Sourwine, you testified this morning that when the packet of letters, packet of Finbar letters, we can now call them, including the one that we have been concerned

with here, was set aside for disposition and destruction, that you were aware that the case was on appeal?

A. Yes, sir.

[Tr. 383] Q. And you stated in addition that you did not have that fact in mind in juxtaposition to the removal and destruction of the packet of letters?

A. Yes; I did so, Mr. Hitz, and I——

Q. Just a minute now. Did you say that this morning?

A. Yes, sir.

Q. All right. Let's get one thing at a time now, Mr. Sourwine.

Now having said that this morning, do you now have anything you care to add to it as indicated by what you have just attempted to say when I broke in?

Do you care to complete what you were saying?

A. Yes; I should like to, Mr. Hitz.

Q. I want to give you that opportunity now, and then I am going to move on to another question.

A. All right, sir.

Q. Thank you.

A. I just wanted to point out there is still a shade of an implication there which I don't think is justified or intended. As I explained here much earlier in this trial, I am sure that shortly after the case went up on appeal I had noted the fact that it had gone up on appeal. I don't mean legal notice, but it came to my attention, therefore I can't deny that [Tr. 384] at the time any subsequent action was taken I knew it was on appeal, but in the sense that I had in the forefront of my mind in my conscious thought at the time that this packet of letters was disposed of the fact that in this was a particular letter concerned with a particular case which was up on a appeal, it simply isn't so. I did not have that fact in my mind at the time.

Q. Thank you.

A. Yes, sir.

Q. I think you have answered just what I had in mind.

Now on a slightly different aspect of that subject, Mr. Sourwine, you a few minutes ago were asked a number of questions by Mr. Rauh which elicited finally an answer to this effect, that you now recollect that at the first trial you

were asked questions by Mr. Rauh bearing upon your credibility with reference to your testimony as to the contents of the letter.

Do I, when I say that, correctly summarize your last and perhaps final answer to that line of questioning.

A. I think you state correctly the condition of the record. I could not, for the life of me, recall any particular question that he asked in that regard.

Q. Well, I am not asking for that. Have I correctly [Tr. 385] summarized the conclusion of that line of testimony and your answer that makes that conclusion?

A. Yes.

Q. All right, sir.

I now want to ask you, sir, if when you disposed of the packet of Finbar letters, including this one, you were aware that you were disposing of a letter which bore upon the credibility of a witness at the trial; namely, yourself, and which issue was on appeal—excuse me, strike the last—and you were aware that you were disposing of a letter bearing upon the credibility of a witness; namely, yourself?

A. No, sir; my irritation at that kind of thing doesn't last that long. I didn't have that.

Q. Now, irritation?

A. Yes.

Q. What has irritation got to do with my question, sir?

A. Well, answering your last question first—

Q. That's the one I want you—well, all right, sir.

A. Yes, sir. I was irritated, as I said, at what I considered Mr. Rauh's challenges to my credibility throughout the trial, but I understand that that kind of thing takes place in a trial. The irritation vanished and with it vanished any reason to specifically remember the question of my credibility [Tr. 386] I should have answered your question with a simple negative, sir. The answer to the earlier question is no.

Q. Will you please now give a declaratory one-sentence answer to my question, if you are able to. It has been interspersed with two questions from me, a question from me, a colloquy concerning irritation, and then a partial answer at the end.

Will you please answer this question, sir; when you disposed of the packet of Finbar letters, including the letter we are discussing here and were at the last trial at times, aware that you were then disposing for destruction a letter bearing upon the credibility of a witness at the trial then on appeal, that witness being yourself?

Will you answer that question, if you understand the question. If not, I will give it again.

A. I am sure I understand the question.

Q. Will you give the answer?

A. And the answer is no.

Q. Thank you.

Now when you earlier mentioned something in answer to my question concerning irritation, are you suggesting at all that the disposition of this letter had anything to do with irritation at anybody for any purpose?

[Tr. 387] A. No, sir, I am not.

Q. Have you given such explanation as you care to give of your use of the expression "irritation"?

A. Yes, sir.

Mr. Hitz: No further questions, Your Honor.

The Court: All right.

Are there any further questions?

Mr. Rauh: Yes, Your Honor, my questions will go to the redirect on the question of awareness.

Recross-examination.

By Mr. Rauh:

Q. Mr. Sourwine, you are an attorney?

A. Yes, sir.

Q. Would you state your legal background, your education, legal education?

A. I am a graduate of National University Law School. I practiced in the District of Columbia, 1936 to 1942. I went with the Senate Committee on the District of Columbia as counsel of that committee early in 1942. I have been employed as counsel to various Senate Committees all the

rest of my life except ten or eleven months in 1956, at which time I was not employed.

Q. You have been a lawyer all your life? Would that be fair?

[Tr. 388] A. I've been a lawyer since 1936.

Q. I would like to read you from Wigmore On Evidence and ask you if you were aware of this rule of law at the time you destroyed the letter—excuse me, caused the destruction of the letter.

Mr. Hitz: Will you give the reference?

Mr. Rauh: The reference is Wigmore On Evidence, Third Edition, Volume II, Section 278, page 120: (Reading)

"It has always been understood—the inference indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit."

And again I would like to read from and ask whether the witness is aware of this rule of law as stated by Wigmore: "The applicability of the general principle . . ." —I am now reading from Section 291: (Reading)

"The applicability of the general principle to an [Tr. 389] opponent's non-production or suppression of documents or chattels has always been assumed."

Were you aware of this when you destroyed—caused the destruction of that document?

A. If the Court please, I can't answer that with a yes or no without explanation, or perhaps I should say I can answer it with a no but it takes an explanation in order to be honest. The answer is no, and this is the explanation. I once read Wigmore. I have consulted him more than

once. I don't think I could at any time since I last passed the bar examination and perhaps not then have quoted what you have just read. I think I would have accepted that any time since I got out of law school what you have just read as probably applied to a case where it was in point as being the law. I did not have this in mind at the time of the disposal of this particular letter, this packet of letters that was disposed of. I did not have this in mind.

Q. But you did know this was a rule of law, didn't you, Mr. Sourwine?

The Court: Wait just a moment. The Court feels we are going very far afield. This witness has already answered all of the facts surrounding the letter in question. The Court feels that the record clearly indicates. Now there has to be [Tr. 390] an end to this sometime. The Court understands, and just in order to make it clear so that there can be no misunderstanding between counsel for the defendant and the Court, the Court understands from this witness' testimony that some time in the second quarter of 1959 moving from the Senate Office over to the New Senate Office Building that certain records were destroyed, that among those records was this particular letter, that there was no consciousness of the letter itself.

Mr. Rauh: I don't understand that, Your Honor.

The Court: Is that your understanding?

Mr. Rauh: No, Your Honor, there was clear consciousness of the letter itself. He says—I disagree entirely.

The Court: There is clear consciousness of all of the letters written by this—

Mr. Rauh: Including this letter.

The Court: (Continuing)—including this letter, but this letter was not taken out specifically and destroyed.

Mr. Rauh: Well, I would like to examine more into that. If Your Honor has told me I may not examine any more where I was, I will stop there.

The Court: All right. Now the Court is perfectly willing to give you the widest latitude, but the Court feels that there has to be an end to it somewhere.

[Tr. 391] Mr. Rauh: May I state my reason for this, for asking these questions?

I don't think there is a lawyer in this country who would destroy a document if he knew this rule of law that the destruction of the document is evidence against its existence, and therefore I wanted to find out if this witness knew this rule of law. If Your Honor says I can't ask it, I will desist.

The Court: Well, you have already asked it, have you not?

Mr. Rauh: I don't believe I got a frank answer to it. I don't believe it's been properly answered on this record.

The Court: All right, the witness may answer that particular question.

The Witness: I am sorry, Your Honor, I'm confused as to just what the question is.

By Mr. Rauh:

Q. I will phrase it again.

Did you, at the time you caused the destruction of this document, know the rule of law that the destruction of the document was evidence against its existence or against the contents so asserted?

Did you know that at the time you destroyed the document, or didn't you?

[Tr. 392] A. Mr. Rauh, I am sure that I knew enough law at that time to have accepted readily, either what you've just read from Wigmore or a reasonable restatement of it. I am not sure now, and I doubt if I would have been sure then, that the mere fact of the destruction of a document is evidence against its existence. That would be a logical contradiction in terms. You couldn't prove it was destroyed unless it did exist, and what you've just read me from Wigmore leads me to believe that the rule of law is that destruction or concealment by a party to a proceeding may be argued as against the existence of the document, or perhaps indeed against the bona fides of the party in his cause.

Now I did not have those matters in mind. They were remote from my consciousness, as His Honor has mentioned it, at the time that the packet of Finbar letters was disposed of.

Q. But you knew it at that time? It wasn't in your consciousness, but you were aware of it? You knew that rule?

A. I just testified with respect to the state of my knowledge of the law as best I can recall it.

The Court: Wait just a moment. Will you step down, please.

Will you gentlemen come up here.

[Tr. 393] (At the bench:)

The Court: The Court feels this is out of context because actually the Court must take notice of the fact that this particular matter was raised at the first trial. It went to the Court of Appeals and it was disposed of. It was on its way to the Supreme Court, or maybe was on its way to the Court of Appeals.

Mr. Rauh: It was on its way to the Court of Appeals.

The Court: But Wigmore's rule actually, I think you will agree, pertains to a document that is to go into evidence that has been destroyed, does it not?

Mr. Rauh: Oh, yes, and I thought this document—I was continuously at all times claiming the document had to come into evidence.

The Court: But my point is that the Court had already ruled—the lower Court had already ruled that it had not gone into existence and there is a wide difference between his saying to a Court, for instance, I destroyed the letter before the first trial, if you get my point.

Mr. Rauh: I get your point. I most respectfully disagree, but I get the point and I will desist.

The Court: All right.

[Tr. 394] (In open court:)

The Witness: If it please the Court, may I make an additional statement that might help to clarify this situation?

The Court: You may.

The Witness: I don't mean this to be especially responsive to the answer, to the question, but I hope it may be helpful.

I had no idea, no thought in my mind at the time that

these letters were laid aside for disposal that I was then doing anything that would open me to criticism or worse, or that I was taking any action not wholly proper and within my authority. The question of impropriety of what I was doing never entered my mind at the time.

By Mr. Rauh:

Q. You spoke for the first time on recross, or on redirect, I believe, about a packet of letters.

Will you describe that, please?

A. Do you mean describe particularly this batch or packet of letters?

Q. Yes; what form were they in? Were they in a yellow envelope, were they separate, were they in a file, what was the file called, and so forth?

[Tr. 395] A. The letters were sheets of paper, ordinary correspondence size paper. They were nearly all on plain white paper. I think there may have been one or two on ruled paper, white, this cheap kind which you buy in any drug store. There were approximately thirty letters, and perhaps forty to fifty sheets of paper. All of the letters were, single-spaced on both sides of the paper, and seldom was there any margin at the bottom. They were together in a plain manila file folder, and I'm quite sure that what was written on that folder, on the tab of that folder, was simply the word "Finbar" printed in capital letters because that's what finally flashed in my mind this morning when I got the name. I got a picture of what was written on that folder.

Q. Now did you just say, destroy the folder, or did you take letter by letter and put it over from one pile to the other?

A. No; I put the whole folder in a basket which was slated for destruction.

Q. You just took the whole folder of "Finbar" and said, "Throw it away," destroy it, is that right?

A. Yes.

Q. Now I think you testified on redirect that you had no thought of the credibility challenge to you at the time

[Tr. 396] you took the Finbar packet and threw it on the other pile, is that correct?

A. Yes, sir; that's the substance of my testimony.

Q. Do you remember the following statement by me when I was approximately the same distance from you that I am now, reading from page 143 as follows:

"Mr. Rauh: The general principle that I was going on in asking for that letter is we made a prima facie case. It is a sheer matter of credibility. I do say here in all sincerity that I think we have made a prima facie case that there is no..."

Mr. Hitz: Excuse me, Mr. Rauh, will you give me the page?

Mr. Rauh: I did, 143.

Mr. Hitz: Did you?

Mr. Rauh: I will repeat it. (Reading):

"The general principle that I was going on in asking for that letter is we made a prima facie case. It is a sheer matter of credibility. I do say here in all sincerity that I think we have made a prima facie case, that there is no letter saying what Mr. Sourwine says are the contents of that letter. Now I am not saying there isn't a letter referring to a Shelton. It might even [Tr. 397] refer to Willard Shelton, for all I know. But I am saying there is no letter and that we have shown that, because if they had a letter like that, they wouldn't have issued a subpoena to a well known, definite and specific Washington newspaperman, and if they had a letter like that, Mr. Sourwine would never have cross-examined the defendant the way he did, and I want this letter to show that there wasn't probable cause to go after the defendant. I don't believe this letter exists in the terms in which Mr. Sourwine has stated. He admitted—he stated it from memory—he said he hadn't seen it for over a year. This is a sheer case of credibility."

By Mr. Rauh:

Q. Do you remember my saying that in front of you to the judge?

A. I don't remember the specific words. I do, now that you have refreshed my recollection, recall that you spoke to that effect, and of course I don't question the accuracy of what you have read.

Q. But you didn't remember that two years later? Is that your testimony?

A. I did not have that in mind. If it had been read to me or I had been asked about it at that time, I think I would [Tr. 398] have given substantially the answer I gave here. I certainly would have remembered it, but it was not in my mind at the time. The sight of this packet of letters did not call up to my mind the courtroom, the Shelton trial and what you had said. I was thinking in terms of what do we need to keep, and in that sense I answered myself and acted by putting this aside for disposal.

Q. How many file cabinets did you take from the one to the other?

A. I beg your pardon?

Q. How many file cabinets did you take from your old offices to your new at the time you destroyed this letter?

A. Oh, you mean how many committee file cabinets were moved?

Q. Yes.

A. I'm not sure. I think probably about twenty to twenty-five. We had material covering more than that, I mean occupying more space than that, considerably more, but we got a lot of new cabinets and a lot of this material was put into the portable files and brought over that way.

Q. You took twenty to twenty-five file cabinets, how high, six feet high?

A. They are standard file cabinets. No; I don't think [Tr. 399] it runs six feet high. I think I can look over the top of them. I would say five feet and something.

Q. You carried over to the new offices twenty or twenty-five cabinets, five feet or more high?

A. I didn't carry them; no, sir. They were——

Q. The committee did?

A. They were moved on behalf of the committee by the custodial force.

Q. The committee staff took twenty to twenty-five file cabinets, five feet or so high, along with it, is that correct?

A. Yes; that's a fair general statement. They didn't physically pick them up and carry them, but they were marked to be moved and the custodial staff moved them when the committee moved.

Q. And there wasn't room for the one letter challenging your credibility, is that what you're saying here?

A. No, sir; that's not what I'm saying.

Q. Well, you may explain?

A. I don't know what explanation you want, sir.

Q. If you don't care to make one, I have no further questions.

The Court: All right.

[Tr. 400] Further redirect examination.

By Mr. Hitz:

Q. Mr. Sourwine, if you have an explanation you make it. Never mind whether Mr. Rauh wants it. If you have an explanation to that final conclusion to your testimony of two days, please make it?

A. Well—

The Court: Wait just a moment. Hasn't the witness already explained it?

Mr. Hitz: I don't know, but he said he doesn't know what Mr. Rauh wants. But if he has something in his mind that he hasn't said that ought to be said, I think we may as well listen to it.

The Witness: I have something in my mind that hasn't been said—

The Court: All right.

The Witness: (Continuing)—and maybe it ought to be said. Mr. Rauh's question implied that this document was in among a mass of other material in a large group of file cabinets, and at the time I removed this document for dis-

posal it was in a safe. It's not a large safe; nevertheless it cannot be said, and I did not have in mind that I had to take things out of that safe in order to put other things in, because [Tr. 401] there was still room in it to put things, but this packet or batch or file folder of letters, the Finbar letters, was one of a number of items removed from that safe and placed aside for disposal by destruction, and the purpose was not primarily to make room; the purpose was to bring things more up to date. The purpose was to eliminate material that was no longer needed. The background objective, yes, of course, it's neatness; it includes making more room, and the girls, and I think one or two of the men, were doing the same kind of thing with all the files. Duplications were being eliminated. Extra copies were being gotten rid of. Obsolete stuff was being removed, and I was doing a little house cleaning on my own. That's the whole situation, Mr. Rauh. I have never said or attempted to say that I had to dispose of this in order to make room. That's all. I thought of saying that and then decided it would be taken as argumentative and so I subsided.

Mr. Hitz: We have no further examination, Your Honor.

The Court: All right.

Are there any further questions, Mr. Rauh?

The Witness: Your Honor, before I leave I have this unopened letter that's been received. I believe it probably is the certification I was asked to secure. May I open it and see whether it is?

[Tr. 402] The Court: Yes, indeed so.

The Witness: This is a photostatic copy of a certification by Mr. Davis, dated April 8th, 1957, and countersigned by Senator Eastland respecting what is referred to as a full and accurate text of a notice of address to members of the committee apprising them of the Chairman's action respecting the appointment of the Internal Security Subcommittee under and pursuant to S-Res. 366 of the Eighty-First Congress. I had asked him for an actual certification. I can only assume he did it in photostatic form to be able to send something up here sooner.

This is it, Your Honor.

The Court: All right.

Mr. Rauh: May I see it?

The Court: Yes, indeed.

(The document was handed to defense counsel.)

Mr. Rauh: I think we should have Mr. Davis or else I cannot accept this, and since Mr. Sourwine feels that he does not know the details of how this happened I think we better have Mr. Davis.

The Witness: I don't say that I don't know the details of how that happened.

Mr. Rauh: No, but how this approval came. You told [Tr. 403] us this morning Mr. Davis—I think we better have him this afternoon. This is not very significant. This was 1951, unrelated to the Congress we have, but it is unclear on its face as to exactly what it is. If Mr. Hitz wants to offer it, he may. I object to it without Mr. Davis.

The Court: All right, are there any further questions of this witness?

Mr. Rauh: I have none, Your Honor.

Mr. Hitz: I would like to examine this, if you will let me, Your Honor. I haven't seen this before although I may have seen a copy of it.

The Court: All right.

(Counsel for the government then examined the document.)

Mr. Hitz: No further questions of the witness, Your Honor.

The Court: All right, you may step down.

(Witness excused)

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[Tr. 605]

PROCEEDINGS

1:30 p.m.

The Deputy Clerk: United States vs. Robert Shelton, Criminal Action 825-62.

Mr. Rauh: The defendant notes that Senator Eastland is in the courtroom and requests that he take the stand, Your Honor.

The Court: All right.

Thereupon JAMES O. EASTLAND called as a witness by the Defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Rauh:

Q. Will you please state your name, sir?

A. Did you say my name and address?

Q. Yes, you can state both.

A. James O. Eastland, Doddsville, Mississippi.

Q. And you are the Chairman of the Senate Judiciary Committee?

A. That's correct, sir.

Q. And you are the Chairman of the Subcommittee on Internal Security?

A. That's correct, sir.

Mr. Rauh: May I have, please, Exhibit 10?

(The document was handed to Mr. Rauh by the Deputy Clerk.)

[Tr. 606] By Mr. Rauh:

Q. Senator Eastland, Exhibit 10 of the Government is the citation of the defendant, Robert Shelton. There is included in it a report from your committee. I would like to ask you if that report was made by you?

A. Yes, sir, it says so. I don't remember it, but it says so.

Q. You don't deny that that report is yours?

A. No, sir, I wouldn't deny it. I judge it solely because my name is on it.

Mr. Rauh: Your Honor, I request permission to cross-examine Senator Eastland as a hostile witness, as the man who made the report on which this prosecution is based.

The Witness: Well, now, the report was made as committee chairman, as under the rules they must be made. I agree with the report.

Mr. Rauh: I understand that, Senator.

My request is to cross-examine him as a hostile witness

on the ground that the prosecution stems from the report of the committee which he headed and which he has just identified.

The Court: You may proceed to get to any of the facts in the case.

Mr. Rauh: I would now like to request Mr. Sourwine [Tr. 607] be excused. He might very well be recalled after this testimony, Your Honor.

The Court: All right, Mr. Sourwine.

(Mr. Sourwine withdrew from the Courtroom.)

By Mr. Rauh:

Q. Senator Eastland, when did you become aware that we had a subpoena for your appearance here, sir?

A. I became aware—Mr. Cheatham told me that there was a forthwith subpoena, and it was the day that I spoke in Senate against the motion that is now pending. I could have known—I don't know.

Q. The day you spoke in the Senate, if I can help you, was Thursday, the 17th of January. Was that the first time you became aware of the existence of the subpoena?

A. I could have known before that, sir.

Q. Were you in town on the 15th and 16th of January, Senator Eastland?

A. Well, I was in town the day that I was assigned to speak. I have a business in Mississippi and it had been my intention to go and come back on Sunday, but I was assigned a day to speak, and so I did not go.

Q. So, you were in town on the 15th and 16th?

A. Yes, sir. Oh, I have been here since the day Congress convened.

[Tr. 608] Q. Do you have any idea how the return on the first subpoena for your appearance came to have the words Senator Eastland is out of town on it?

A. No, sir. I talked to Mr. Cheatham. I got a letter from you, sir, in which you made that statement. I talked to Mr. Cheatham about it today and he told me that his report to a Deputy Marshal was that I was unavailable.

Now, if I was called—the Sergeant-In-Arms of the Senate

is sick and in Arizona. There are two men who act as Sergeant-At-Arms. Now, I don't remember if the other one ever contacted me. I know Mr. Cheatham did.

Mr. Rauh: May I have the jacket, please?

The Court: Certainly.

(The Court file was handed to Mr. Rauh.)

By Mr. Rauh:

Q. I show you the subpoena, Senator Eastland, and call your attention to the fact that it says as follows, you can follow me:

"Not to be found. Information received from Assistant Sergeant-Of-Arms of Senate Senator Eastland is out of town."

A. I don't know which Assistant Sergeant-At-Arms. You have got two there. Mr. Cheatham told me that he informed the Marshal's office that I was unavailable, that I was speaking.

[Tr. 609] Q. You don't know how it got on the subpoena that you were out of town when you weren't?

A. No, sir. As I told you, the middle of the week we have been divided into three teams, in which one team will speak one day and rest two days. It's been my information that I would not speak on the Thursday that our team was to be in command of the floor and I had intended to go to Mississippi, but when I was assigned the duty of protecting the floor on Thursday I did not go to Mississippi.

I cannot tell you anything about the return on the subpoena. I know that I told Cheatham that I would not honor a forthwith subpoena, that before I would testify I would get the consent of the Senate. Now, I introduced a resolution to that effect. It was approved unanimously by the Judiciary Committee last Thursday, and we were not permitted to file a committee report, and today I got the majority leadership to agree to get a unanimous consent agreement to file it and approve it by the Senate, which was granted.

Q. Have you had a chance before coming here to talk to

any members of your staff about this testimony you are about to give?

A. Well, yes, I have talked to Mr. Davis and I have talked to Mr. Sourwine.

Q. Did you talk——

[Tr. 610] A. But not about the testimony I am about to give because I don't know what—I am your witness. At least I was subpoenaed by you, and I don't know what information you want.

Q. What was your discussion with Mr. Sourwine, Senator?

A. Well, I don't remember. I can remember these hearings in a general way and I have asked him questions about the hearings and I have asked questions about the rules under which we were operating back in 1956. Then I made the same inquiry about the rules from the Clerk of the Committee, Mr. Joe Davis. Maybe I asked them something else. If I did, I don't remember.

Q. Did you discuss Mr. Sourwine's testimony that he gave here with him?

A. No, sir.

Q. Senator, are you aware of the fact that Shelton has been tried twice for his alleged contempt before your subcommittee, that he was tried once in '57, is now being tried again?

A. Mr. Sourwine told me that. I didn't know it.

Q. But you are now aware that he was tried once before?

A. That is what Mr. Sourwine told me, yes, sir.

The Court: Tried once before.

Mr. Rauh: Yes, Your Honor.

The Court: Yes.

[Tr. 611] By Mr. Rauh:

Q. Senator Eastland, at the previous trial the United States Attorney who is here, in answer to a bill of particulars on what was the question under inquiry before your committee at the time Mr. Shelton appeared, said as follows, and I now quote:

“The Government contends——”

Mr. Hitz: Excuse me. Will you give me the page?

Mr. Rauh: Page 20.

By Mr. Rauh:

Q. (Reading:) "The Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution."

That, I inject, is 366. That is the resolution, is it not, of the Senate Internal Security Subcommittee?

A. I know about Resolution 366.

Q. All right. Now to go back, then, to read exactly what Mr. Hitz said:

"The Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted."

Does that correctly state your view of what the question—

[Tr. 612] A. Now repeat that, please, sir.

Q. I will. Let me ask the question and then I will repeat the quote.

A. All right, sir.

Q. Does that correctly reflect your view of what the question under inquiry was at the time Mr. Shelton testified? And I will now repeat the quote that you asked me to do.

A. All right, sir.

Q. (Reading:) "The Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted."

In your view does that correctly state the question under inquiry before your committee at the time Shelton testified?

A. Well, I think the facts are these: As I recall, Senate

Resolution 366 gave the Judiciary Committee power to investigate, to protect the internal security of the country, that the chairman of the committee at that time set up a subcommittee. Now, before I was appointed Chairman of Internal Security we had had investigations on a number of subjects. One of them was communist infiltration and domination of mass media of communication, and these particular hearings would [Tr. 613] come under that head. It was an investigation of the infiltration of newspapers. And those are the facts, as I recall them, as to the extent of the depth and the extent of the infiltration and what we could do, within the limits of the Constitution, to protect this country.

Q. Let me ask you—

A. Now, that was the legislative purpose. That is—well, that is what I have got to say.

Q. Well, let me ask the question again, since I don't feel you answered it.

A. All right, sir.

Q. I repeat the question. At the first trial Mr. Hitz stated what I am going to read to you. I am asking you whether at the time you examined—

A. The best way I can answer the question is to tell you what the facts were.

Q. Senator, for once you are not asking the questions; I am.

A. I know that, I understand that, but I say the best way I can answer your question is to tell you what the facts were, and those are the facts as I recall them.

Q. Senator, if you asked a witness a question and he didn't answer it, would you take his way of answering? I am asking you a question, and this is the question:

A. Go ahead.

[Tr. 614] Q. At the first trial Mr. Hitz stated, and I am going to read you what he said as the question under inquiry. I want an answer from you whether he was right or wrong, on the basis of your knowledge of what the question under inquiry was. This is Mr. Hitz' statement:

"The Government contends, and the indictment states, that the inquiry being conducted was pursuant

to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted."

Do you or do you not agree that that statement correctly reflects the position of the committee at the hearing?

A. Well, of course, all the power—well, part of the power we have got extends from that resolution.

Q. I asked you whether you agreed. I think this can take a yes or no answer, Senator.

A. Well, I don't think it can. I think the facts are what should control.

Q. You won't answer the question, then?

A. Yes, I have answered your question. I have given you what the facts were, what the facts are.

Q. I asked you, Senator, whether you agreed or disagreed with Mr. Hitz' statement that there was no smaller, more limited inquiry being conducted than the whole resolution. Was [Tr. 615] Mr. Hitz right or wrong?

Mr. Hitz: Excuse me, please, sir. Don't answer the question.

I object. It's repetitious. The question has been answered.

Mr. Rauh: I do not feel it's been answered, Your Honor. I feel this witness has been evasive and I ask that it be answered.

The Court: The objection is sustained. The Court feels that the question has been answered.

By Mr. Rauh:

Q. I would like to read you, since I seem unable to at least satisfy myself as to your willingness to answer about what Mr. Hitz said, I now read you what Mr. Sourwine—

A. The only way I can answer is to give you the facts, sir.

Q. Now I will read you what Mr. Sourwine said at this trial and ask you if you agree with that.

A. All right.

Mr. Hitz: Page, sir?

Mr. Rauh: Page 296 of the transcript.

Mr. Hitz: Excuse me just a moment. Please give me a chance to find it. (Pause.) I have it.

[Tr. 616] By Mr. Rauh:

Q. (Reading:) "I repeat my question. Did you ever say that the question under inquiry at the January 6 hearing was the scope and extent and activities of the communist conspiracy against the United States?"

"I believe I did, yes, sir."

My question to you, Senator Eastland, is: Do you, too, agree with Sourwine's answer that the question under inquiry was the communist conspiracy against the United States?

A. Well, of course, that is true of all the hearings. We were proceeding at that time into infiltration and domination of mass media of communications, is the way I recall it.

Q. Senator, when did that hearing get started?

A. Well, now, I am informed that it was in 1956. I didn't remember the date of the hearing, whether it was '55 or '56, and I have been advised that it was '56.

Q. How did it get started?

A. Mr. Sourwine—well, to begin with, I had received information from intelligence—some intelligence agencies connected with the Army and Navy that one of the principal objectives of the Communist Party was the infiltration and control of the press, radio, and television. I had received that information over a period of years, beginning about 1956—'46. Now, I don't remember whether, when I became [Tr. 617] chairman in 1955, whether Sourwine—whether we laid out an agenda of what we were going to do in that Congress. I don't remember. And how they got started, frankly, I don't remember.

Q. You don't remember how you got started going after these newspapers, Senator?

A. Mr. Rauh, I have heard several hundred witnesses. In 1956 I was appointed Chairman of the Judiciary Committee. With the duties there, I had to give up most of the work of the Internal Security Subcommittee. It was

handled by Senator Jenner, and it was handled—handled now, a lot of it, by Senator Dodd. I don't have the time to devote to it and I can't remember the details.

I do remember this about it: that Sourwine talked to me about information that he had, what witnesses would testify, and we took it up. I think we had a rule then, if I am not mistaken, that the subcommittee, full subcommittee must approve a hearing. I don't remember whether that was the rule then or not. But the hearings, executive hearings were authorized in New York City, and I remember then that the question came about open hearings and that I read a part of the testimony in New York.

Now, he discussed with me, before the hearings, what information he had and what he thought witnesses would testify, and I authorized the subpoenas or I issued the [Tr. 618] subpoenas.

Q. Let's parse this answer a little bit, Senator.

A. All right, sir.

Q. There are several different things involved there.

A. All right, sir.

Q. You were referring to a rule of the Senate that no hearing—

A. No, no; I am talking about—if I remember correctly, in 1955 there were some rules for investigating committees that were changed. It was based on some of the McCarthy hearings. Now, the only thing I can give you is my best recollection. I think it wasn't a Senate rule, it was a committee rule, and one of them was that you had to have two witnesses to take testimony, if you could get two witnesses, if they were available. Another one was—

Mr. Hitz: Excuse me. Do you mean two Senators, sir? You said two witnesses. Do you mean two Senators?

The Witness: Yes, sir. If you could get two. If you couldn't, you could go ahead. Now, another one was, as I recall, that the full committee—I mean the full subcommittee must authorize an investigation.

Now, that is my best recollection and I could be just as wrong as a wet spell.

By Mr. Rauh:

Q. Senator, are you referring to the rule of the sub-[Tr. 619] committee which reads as follows: "No major investigation shall be initiated without approval of a majority of the subcommittee"?

A. Well, now, what year is that?

Q. This is the one you give out now. I can't tell you when it was adopted. Can you tell me when that was adopted?

A. Well, I think that rule was adopted in 1955.

Q. Now, if that rule was adopted in '55, can you tell me whether there was a meeting of the subcommittee to go into the question of investigating of the press?

A. Yes, sir, I can tell you that at that time it was approved first by the subcommittee. I don't remember that meeting, but I can remember the meeting that approved, in my office, that approved the open hearings here in Washington.

Q. I asked you about the executive committee—the executive hearings, Senator.

A. Yes, sir, every major investigation had the approval of the subcommittee.

Q. There was an approval of the subcommittee of the investigation into what you referred to, communists in mass media, prior to the executive—

A. There was an approval by the subcommittee of the particular hearings in New York City.

Q. Prior to the executive committee hearing?

[Tr. 620] A. Yes, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. Are you sure—

A. I am sure of it, yes, because I made the rules.

Q. You are sure there was an executive committee hearing—strike that. You are sure there was a meeting of the subcommittee before the—

A. We didn't—

Q. Let me finish the question, Senator. I don't interrupt you.

A. All right, sir. Excuse me.

Q. Are you sure there was a meeting of the subcommittee in '55, before the executive hearings in New York, authorizing those hearings?

A. Now, I got—

Q. Yes or no. Are you sure?

A. Well, now, what you want is the truth, isn't it?

Q. I want you to give us the truth, yes, sir.

A. All right. That is what I am trying to do.

Q. You can explain. Yes or no, are you sure, and then explain.

A. Well, I can't answer it yes or no.

The Court: You may explain.

[Tr. 621] The Witness: I approved in every instance, got the approval in every instance of the full committee, full subcommittee, of an investigation.

By Mr. Rauh:

Q. Let me try again. Was the executive hearing in New York approved by a meeting of the subcommittee prior to those executive hearings in New York in the year '55?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Now, if I tell you that Mr. Sourwine said there had been no meeting at all, what would you say?

A. Well, I would think that a lot of things happened that he doesn't know about. For instance, we get a majority on the Senate floor, and if I wanted authority to hold some hearings, we call the members back into Cloakroom and discuss it and go forward with the hearings. There were no minutes made, but we would have a majority of the subcommittee.

I can remember very definitely the meeting in my office that authorized the open hearings.

Q. Let's stick to the executive committee hearings.

A. All right, sir.

Q. Are you now testifying that you had a meeting on the Senate floor of your subcommittee—

A. No, I can't remember where it was, but I said in

[Tr. 622] every instance I received the approval of the subcommittee. And we had people that would object to a hearing unless—members of the subcommittee, unless the approval was first secured, and in every instance I did that.

Now, that doesn't necessarily mean that the staff had to be there, but we would get a majority together and discuss it and approve it.

Q. It is now your testimony that a majority of the subcommittee met. Was this called as a meeting of the subcommittee or was this just—

A. That is the way we handled it. In fact, the full Judiciary Committee has met off the Senate floor a number of times and approved bills, nominations.

Q. Was there any record of this meeting?

A. I wouldn't think so.

Q. Did you tell—

A. If there has ever been a record—I don't know about records of the executive meetings of any subcommittee. They frequently don't keep records. Now, the full committee does. And we could very well have had a meeting and Mr. Sourwine know nothing about it. He is over in the Senate Office Building.

Q. It is your testimony you had a meeting on the floor of the Senate—

A. No, I didn't say that.

[Tr. 623] Q. Where was this meeting, Senator?

A. I don't know, but I said my policy was—

Q. Who was there, Senator?

A. Wait a minute now. Wait a minute now. I don't know. My policy was, in every instance, to get the permission of the full subcommittee, and I had to because we had members on the subcommittee who would object to meetings, to hearings, unless we did receive the approval.

Q. This is a meeting that you don't remember where it was?

A. I don't remember where it was.

Q. And you don't remember who was there?

A. No.

Q. And you don't remember when it was?

A. No.

Q. And you don't have any record of it?

A. We keep no records.

Q. But you are sure it existed?

A. Because of my policy and because we couldn't have called the hearings if we had not received the approval of the subcommittee; there were members who would object. That is my answer.

Q. On page 72 of the record of the earlier trial, I read you from what Senator Hennings said at the opening of [Tr. 624] this hearing:

"I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings——"

Was Senator Hennings wrong when he indicated that the committee hadn't met?

A. Well, I don't know whether he was there or not. That was the open hearings, and I remember the meeting very definitely in my office.

Q. I am talking about the executive committee, the meeting before the executive hearing, and I am asking you whether Senator Hennings was wrong.

A. Hennings there is talking about the open hearing. That was a statement he made in the open hearing.

Q. He said, "the committee has not met." Was he right or wrong?

A. Well, he was wrong; and I can remember that he was present in my office when the open hearings were held.

Q. We are asking prior to the executive committee meeting.

A. Yes, sir. Senator Hennings was, as I recall, and I have been informed, was one of the two Senators who went to [Tr. 625] New York and conducted the executive hearings.

Q. Senator Hennings said there was no meeting, Sourwine said there was no meeting, you can't remember——

A. I said there was.

Q. May I finish my question?

A. Yes, sir.

Q. Senator Hennings said there was no meeting, Mr. Sourwine said there was no meeting, you can't remember when it was, where it was or who was there?

A. No, sir.

Q. But you say there was a meeting?

A. I say there was a meeting to authorize every single investigation, and I say that because of the views of some members of my subcommittee. There could not have been an investigation had there not been prior approval by the full subcommittee.

Q. Do you find it surprising that Mr. Sourwine was unaware of that policy?

A. Well, you read the rules of the subcommittee. I judge he knows what the rules are. I don't know.

Q. Do you know at the first trial Mr. Sourwine testified that that rule had never been followed?

A. It's not followed now.

Q. He testified it had not been followed at the time of [Tr. 626] this hearing.

A. It hasn't been followed in several years, but at that time and to the time I became Chairman of the Judiciary Committee it was scrupulously followed; and as I recall, Senator McClellan was the moving spirit in getting the full committee to authorize an investigation because of the experience he had had on the McCarthy Committee.

Q. Senator McClellan was the moving spirit?

A. As I recall, he was, because of his experience on the McCarthy Committee.

I have heard several hundred witnesses and, I judge, several hundred hearings and I can't remember the details of any one of them. I was thinking today that I am usually Chairman of the Committee on Nominations, that I can remember two District Judges, three with Judge Cooper lastly, and I can remember the details—I can remember the hearing of Mr. Justice White and the new Justice, but I don't remember who testified or what they testified.

Q. Why does your committee not keep a record of these meetings if the rule requires that there be such meetings?

A. The rules never required that a record of the meetings be kept. But we kept none and have never kept a record of subcommittee meetings. In fact, frequently you can't get a quorum of the subcommittee, and to get a bill out of a sub-[Tr. 627] committee you poll the subcommittee.

Now, I can remember that when I became Chairman of Internal Security, that because of the pressure on me, I had to scrupulously follow that rule of getting prior authorization, and I didn't call on the staff to do it, I did it myself.

Q. You didn't mean to say before that there are no records of the subcommittee meetings, did you, Senator?

A. Well, there could be records of some of them. Certainly there can be records of some of them. I can't say that we haven't—where we take testimony, of course there is a record; but I would say this, that in most of the meetings where decisions are made or bills are reported out there is no official record.

Q. Let's stick to meetings where hearings are started.

A. All right, sir. There could have been some where there was a record, but I don't recall it.

Q. Are you willing to try to produce a record of the meeting you remember that Mr. Sourwine has testified didn't exist? Are you willing to try and produce a record of that?

A. If there was such a record, but as a rule we kept no records. We just got the agreement, discussed the matter and got the agreement of a majority of the subcommittee and then we proceeded. That is what we customarily did.

Q. Do you remember—you don't remember when it was. I won't ask you that again.

[Tr. 628] A. No, I don't remember. I don't remember any of the details of it.

Q. You just know it was in '55? That's all you remember?

A. Well, I remember that the executive hearings in New York were in 1955, and I remember that in every instance I had to get the prior consent of the committee. But we didn't have a meeting and keep minutes or records of it; it wasn't necessary.

Q. What did you get the consent of the subcommittee to at this meeting?

A. Well, I would discuss the subject and the witnesses, what information they had.

Q. You told this subcommittee meeting, that you can't remember where or when it was or who was there, what information you had?

A. I did that in every case. The only meeting that I can remember when I was chairman, the details of it, was in my office, preceding the open hearings, and there is a reason that I can remember that.

Q. Senator, let's stick to the meeting I am talking about, if you don't mind.

A. All right.

Q. You mentioned before that you told the Senators at this informal subcommittee meeting—

A. I mentioned—wait a minute now—I mentioned that [Tr. 629] my policy was, when we got permission.

Q. What did you tell them at this meeting?

A. Well, I judge I told them that we had witnesses and outlined the information.

Q. What information?

A. Well, I can't recall what any of them testified. I don't remember. The only person that I remember testifying at this hearing was a man named Knowles.

Q. No; I am asking you what information you said you had of this subcommittee meeting prior.

A. I don't recall that, sir.

Q. It's only—

A. It was whatever I was told in a—

Q. It's only eight years ago, isn't it?

A. Yes, just eight years ago.

Q. Doesn't your subcommittee continuously ask people things about what happened fifteen or twenty years ago, Senator?

A. Yes, sir; but as I told you, sir, I have heard hundreds of witnesses and, I judge, several hundred hearings in the meantime, and I am just a human being, I can't recall all of them. If there is something that calls it to my attention, as what happened in my office when the open hearings were authorized, why, I can remember that. It would have to be something like that.

A. The rules never required that a record of the meetings be kept. But we kept none and have never kept a record of subcommittee meetings. In fact, frequently you can't get a quorum of the subcommittee, and to get a bill out of a sub-[Tr. 627] committee you poll the subcommittee.

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Q. Do you remember—you don't remember when it was. I won't ask you that again.

[Tr. 628] A. No, I don't remember. I don't remember any of the details of it.

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A. Yes, just eight years ago.

Q. Doesn't your subcommittee continuously ask people things about what happened fifteen or twenty years ago, Senator?

A. Yes, sir; but as I told you, sir, I have heard hundreds of witnesses and, I judge, several hundred hearings in the meantime, and I am just a human being, I can't recall all of them. If there is something that calls it to my attention, as what happened in my office when the open hearings were authorized, why, I can remember that. It would have to be something like that.

[Tr. 630] Q. Senator, doesn't this particular hearing, because of the New York Times aspect, stick in your mind pretty well?

A. No, sir.

Q. You don't remember a considerable public controversy over this hearing?

A. Yes, sir; that came up after the hearing started. Certainly I remember that, but I can't tell you who testified or what they testified, except Mr. Knowles.

Q. You can't tell us anything about a meeting except it was held, is that correct?

A. Sir?

Q. You cannot tell us anything about a meeting except that it was held?

A. Do you mean the open or executive, now?

Q. You cannot tell us anything about the subcommittee meeting prior to the executive hearings except that it was held?

A. I can't remember the details of any of it. I told you that my policy was to get clearance from the subcommittee before we started hearings and that we did that under a rule that was adopted when Senator Kilgore became chairman of the committee in 1945. I can tell you what my policy was. I also told you that it was necessary to get approval of the subcommittee because certain members of it would not agree to hearings unless the subcommittee had first cleared it. And we [Tr. 631] tried to have a unanimous report and have always tried for the subcommittee to be unanimous in whatever it did.

Q. Senator, would you do me the courtesy of answering one question yes or no? Can you remember anything about this committee, subcommittee meeting, except that it was held?

A. No, sir, I remember nothing about it.

Q. Thank you. At the opening of the first Shelton trial Mr. Hitz stated that in his opinion—

Mr. Hitz: Excuse me, sir. Would you give me the page?

Mr. Rauh: Page 40.

By Mr. Rauh:

Q. (Reading:) "A man off the street could be called off the street and asked, 'Are you one of the persons that we have a duty to protect this country from?'"

Is it your position, as chairman of the subcommittee, that your subcommittee can call a man off the street?

A. Repeat that please.

Mr. Rauh: Would the Reporter please repeat the question?

(The last question was read by the Reporter.)

The Witness: Well, I think when we have a legislative purpose, that we can.

By Mr. Rauh:

Q. You feel that you could just issue subpoenas to the [Tr. 632] first ten people going by?

A. Where there is a legislative purpose, we have the power to investigate.

Q. And you could issue a subpoena to the first ten people going by the Senate subcommittee hearing room and call them in and ask them are you a communist?

A. I haven't studied that question, Mr. Rauh; it calls for a legal answer that I haven't studied. I don't know.

Q. Has your committee ever called anybody on that theory?

A. Not that I know of, no, sir. Now, there have been people subpoenaed since 1956 and investigations held that I don't know anything about because I don't have the time to devote to this subcommittee that I should.

Q. You sign all the subpoenas, don't you, Senator?

A. Yes, sir.

Q. So, you are responsible, aren't you?

A. Yes, sir.

Q. Well, how much time do you devote to this?

A. Well, I generally know when they bring me subpoenas—now wait a minute. I made a mistake when I told you that I had signed all subpoenas. I have not.

Q. Who does?

A. I sign some and Mr. Pace has signed some, my Administrative Assistant, under my authority.

[Tr. 633] Q. Does Mr. Sourwine sign any?

A. No, sir.

Q. Does Mr. Sourwine have any authority to sign any subpoenas?

A. No, sir.

Q. Mr. Sourwine testified that before the 38 subpoenas—the 35 subpoenas that were issued in executive session were issued, that he came to you and said there was information about this list of witnesses and that the only name he mentioned to you was Matilda Landsman, is that correct?

A. I don't recall. As I recall, we discussed the information he was going to get from a number of witnesses. That is my recollection.

Q. He testified that he didn't mention any particular name on this list or give any particular information, is that correct?

A. Well, I will say, as I recall, we discussed what a number of—what the witnesses would testify.

Q. In general, not in specifics?

A. Well, yes, that's true.

Q. There was on this list of 35 a name Willard Shelton?

A. I couldn't tell you, sir. I don't remember.

Q. Do you remember anything he told you, other than that there would be information out of this list?

[Tr. 634] A. No. He told me at the time what information we could get from them.

Q. What did he tell you what information?

A. Well, I have forgotten that. I don't remember what any of them testified, except Mr. Knowles, I can remember that, and there is a reason that I can remember that.

Q. You don't remember anything about the Shelton case, do you?

A. No, sir.

Q. Did you ever hear of Willard Shelton?

A. Well, I judge I presided when he testified. The record shows that.

Q. You presided when Willard Shelton testified?

A. I say I judge that. I have been informed the record shows that.

Q. If I tell you Willard Shelton didn't testify, what would you say?

A. Well, I would say I was wrong, of course, but I don't remember.

Q. At the time you signed a subpoena for Robert—for Willard Shelton did you know anything about Willard Shelton?

A. We had discussed the—he told me what information he could get from the witnesses. Now, as for an individual, I don't remember.

[Tr. 635] Q. At the time you signed a subpoena for Willard Shelton did you have any information about Willard Shelton?

A. I can't answer that question because I don't remember.

Q. At the time you signed the subpoena for Willard Shelton did you have any information about Robert Shelton?

A. I couldn't answer that question. I don't know. I don't remember.

Q. Does the subcommittee keep any records of why they subpoena people?

A. No, sir.

Q. Senator, isn't it a fact that you issued subpoenas for anybody that Sourwine asked you to issue them for?

A. No, sir.

Q. Isn't it a fact that you simply issued this list of 35 or 40 subpoenas because Sourwine came in and said they have information?

A. Well, we discussed the information. Then I had to get the approval of the subcommittee and tell them something about it.

Q. Oh, you got the approval of the subcommittee for all these subpoenas?

A. Oh, no, not for the subpoena, no, sir, but I said to conduct a hearing we had to have the approval of the subcommittee.

[Tr. 636] Q. But isn't it a fact, Senator, that you approved—you signed these subpoenas because Sourwine

said they would give you some information? Isn't that a fact?

A. Isn't what a fact?

Q. Isn't it a fact that you signed these subpoenas because Mr. Sourwine said they would give you some information? Isn't that the way it worked?

A. We discussed what information he had, and it was up to me to determine whether to subpoena them or not, and that is what I did.

Q. But you can't remember anything he told you?

A. No, sir, I don't remember any of the details of it.

Q. Are you familiar with a piece in the New York Times of Friday, January 6th, while these hearings were going on, about the problem of who issued these subpoenas?

A. No, sir.

Q. You didn't read the Times about yourself?

A. Of course I did. I remember the Times attacked me during the hearings, but what they said, I don't remember that.

Q. I am going to read you a statement by Mr. Reston and ask you for once if you will say yes or no, whether it's true. This is from page 104 of the record of the first trial. Here is Mr. Reston's statement in the New York Times of Friday, January 6, 1956:

[Tr. 637] "When more than fifty subpoenas were issued to people in the press, radio and other fields of communication on behalf of the committee last November, Mr. Sourwine was the only person who seemed to know anything about them. They were issued under the name of Senator Eastland, but when this reporter called the Senator about them, he said he did not know they had been issued, did not know the hearings had been called, and said he would have to call Mr. Sourwine to find out the facts."

I ask you, yes or no, did you tell Mr. Reston you didn't know they had been issued, you didn't know the hearings had been called and you would have to call Sourwine to find the facts?

A. No, sir, I don't remember anything about that.

Q. You don't remember a thing about that?

A. No, sir.

Q. Was Mr. Reston right or wrong?

A. Well, I don't remember anything about it. I have told you what the facts were in connection with the subpoenas.

Q. Do you have any explanation if this isn't correct—

A. We had a policy that a lot of times what we were going to do we didn't tell the press.

Q. You had a policy of what?

[Tr. 638] A. What we planned to do we did not tell the press, and I could have been following that policy if I told him that, but I don't remember.

Q. Are you suggesting that saying to a reporter that you didn't know they had been issued, that you didn't know the hearings had been called, was a sort of a no comment?

A. Let's put it this way: I don't remember, but I would have the leeway to handle it as I desired by not telling the press anything.

Q. Do you consider this not telling them anything?

A. Well, I certainly—if I said that, I didn't disclose what I planned to do. What is the date of that, sir?

Q. Friday, January 6, 1956. Did you read this piece at the time?

A. Oh, I could have. I judge I did.

Q. I take it you are saying Mr. Reston was not correctly quoting you when he said you didn't—

A. I just tell you I don't remember anything about it. That is the truth. I can't remember what a newspaper said about me last year or eight years ago. This was eight years ago.

Q. Senator, do you have any idea how many years back your subcommittee goes in asking witnesses about things?

A. Well, we try to get what they remember, of course, [Tr. 639] what the facts are.

Q. How far back do you go?

A. Well, that all depends on the case.

Q. Would you be surprised if I told you I was in front of your own subcommittee last week and they went back to 1944 and made a lady tell about 1944? Would that surprise you any?

A. Well, she answered the questions, didn't she?

Q. But you can't remember what happened then?

A. But she doesn't have to hold hundreds of hearings and examine hundreds of witnesses. I can't remember.

Q. Senator, I am not asking you to remember your conversation with Mr. Reston now. I am not asking you to remember what you told him or that conversation. I am now asking you if he was correct on the facts when he said that you did not know the subpoenas had been issued?

A. Well, I did know the subpoenas had been issued.

Q. Was he correct when he said that you did not know the hearings had been called?

A. I did know when they called hearings. In fact, I had to do it.

Q. So that in fact you are now, in essence, saying that you couldn't have told Mr. Reston that because it isn't true?

A. I don't know. I don't remember that. I could have [Tr. 640] told Reston very well that. I don't know.

Q. You could have told Reston that?

A. Yes, I could have told him that, of course, but I don't remember.

Q. But you don't deny you may have told him that and he accurately reported it?

A. Certainly I don't deny it. I just don't remember.

Q. Senator, if a witness comes before your committee and says he is a victim of accident, what do you do about it at your committee?

A. If a witness comes and says he is a victim of an accident?

Q. He is a victim of accident in being called before your subcommittee, what do you do about it?

A. I don't remember that that has ever happened.

Q. Are you pretty sure it's never happened?

A. I don't know. I don't remember.

Q. Do you have any procedure for quashing subpoenas, Senator, before your subcommittee?

A. Oh, I judge I could withdraw a subpoena. I have never looked into it.

Q. Have you ever done it at a hearing?

A. I don't know.

Q. Have you ever quashed a subpoena at a hearing?
[Tr. 641] A. I don't remember.

Q. Have you ever, at your hearings, ever counted up the number of times a witness has said, I don't remember, and used it as a question of his credibility, Senator?

A. No, sir. I haven't been, Mr. Rauh, to many Internal Security hearings since 1956. I have been to a few.

Q. There was one a couple of weeks ago. I was there, Senator.

A. The hearings lasted three days and I was there about thirty minutes.

Q. You were there the whole time I was, Senator.

A. How long were you there, sir?

Q. I don't know.

A. I was in the room about thirty minutes, and Senator Dodd, as you know, presided.

Q. Now, Senator, I will have to read you a good bit of the opening of the hearings, since you can't remember anything about it, and try to refresh your recollection on the opening of the Shelton public hearing.

You understand, do you not, that the present trial is based on questions he refused to answer at that hearing? Do you understand that?

A. I have been informed that.

Q. This is on page 83 of the record of the first trial:

[Tr. 642] "The Chairman:—" I take it that is you, sir?

A. Yes, sir.

Q. "The Chairman: Call your witness.

"Mr. Sourwine: Mr. Shelton.

"The Chairman: Will you hold your hand up.

"Mr. Shelton: Before I am sworn in, Mr. Chairman, I would like to raise an objection that might have some bearing as to whether or not I am sworn in. I wish to challenge the jurisdiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me—

"Senator Jenner: I cannot hear you. Will you speak a little closer to the mike.

"Mr. Shelton: If I may repeat this. I challenge the jurisdiction of the committee to call me here in Washington, based on the fact that my testimony in executive session makes it clear that the committee will obtain no information from me that could possibly assist it in any legislative purpose.

"To question me further in Washington might subject me to prosecution in violation of my right to be tried in the community where I work and live.

[Tr. 643] "Furthermore, I fail to see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles.

"Mr. Sourwine: Mr. Chairman, what the witness has said boils down to an assertion that because he has refused to answer certain questions before the committee in executive session, the committee has lost jurisdiction to ask him the same or other questions in public session.

"I think that is absurd, and I respectfully ask that the objection be overruled, and that the witness be sworn.

"The Chairman: Yes, the objection is overruled. Will you hold your hand up."

Senator Eastland, at the time you overruled the objection what information did you have about the witness before you?

A. I can't remember. I knew at the time.

Q. You don't remember anything about it, do you?

A. No, sir. Now, I remember reading part of the transcript of the executive hearings in New York City. What the witnesses were or what they said—

[Tr. 644] Q. Do you remember reading the Shelton transcript?

A. No, sir, I don't remember the name of—I don't remember what witnesses. I didn't read all the transcripts.

Q. Isn't it a fact that you simply said overruled automatically?

A. No, sir, because I knew what he was——

Q. What was he called for?

A. Well, I said we knew he had information.

Q. What information did you know he had?

A. Well, at the time we knew what information he had. We had information that he would testify to certain facts, but I can't remember.

Q. You can't remember one fact, can you, Senator?

A. No, sir, I certainly can't. I don't remember the man. I believe Knowles is the only witness whose testimony I remember.

Q. On page 89 of the same hearings Mr. Shelton stated as follows:

"I am involved in these hearings as a victim of accident."

Now do you remember it, Senator?

A. No, sir.

Q. He said:

"I am involved in these hearings as a [Tr. 645] victim of accident. The subpoena first served to me was originally made out in the name of a person who does not work on my paper. A committee aide, when told that there was no such person on the Times, insisted on knowing if there was anyone with a similar name employed there. There were a few, but the only one that interested your man was the sole similar name in the news department, mine. At the executive hearings the committee counsel tried without success to link me with a certain New York newspaper. He was unable to establish any connection because I never worked for the paper under discussion. Yet I have been called back here today. It appears to be just another step in a campaign to discredit the paper for which I work."

My question to you, Senator Eastland, when you overruled the objection of Mr. Shelton that he was involved in these hearings as a victim of accident, what did you know as the basis of overruling that objection?

A. Well, I knew at the time what information we could get from him, but I can't remember at this time. I don't know.

Q. Did you feel any obligation to tell him why he wasn't a victim of accident?

A. Well, now, what my legal obligation was, your judgment [Tr. 646] is as good as mine, sir.

Q. I am asking you whether you felt, as chairman of the subcommittee, any legal—

A. No, sir, because—

Q. Let me finish.

A. Excuse me.

Q. I am asking you whether, as chairman of the subcommittee, you felt any legal obligation to tell him why he was not a victim of accident when he said to your committee, I won't answer because I am a victim of accident?

A. No, sir.

Q. You felt no obligation to tell him why he wasn't a victim?

A. Frequently people will not testify or who will refuse to testify in executive session will testify in open sessions, and frequently we get more information in an open session than we do in an executive session. That is the reason. I judge I didn't know what his reaction would be, but I don't remember at all. I don't remember the witness.

Q. That is not my question.

A. I don't remember what he said.

Q. Have you finished?

A. Yes, sir.

Q. My question is this: When the witness came before [Tr. 647] your subcommittee and said he was a victim of accident, did you feel any obligation to tell him that he was not a victim of accident, that you knew something?

A. At the time I knew, I judge, from discussions with Senator Jenner and Senator Hennings, I knew about what information we expected from the witness. That is the way

I recall it. This witness I don't remember anything about, and I don't see how I can comment on something that I don't remember anything about.

Q. I have read you the statement, Senator. He said, I am a victim of accident. I take it you felt no obligation to explain to him that you had information?

A. I had no obligation to tip my hand where a witness might change an answer he would otherwise make.

Q. Do you think to tell him that he wasn't a victim of accident, that you had information, would tip your hand?

A. You have the record there and you know what happened and I can't add to it or take from it.

Q. Yes, you can add in this respect, Senator, which was: what obligation, if any, you felt to this man to explain to him that he wasn't a victim of accident when he raised this. I take it you felt none? Is that right? Yes or no.

A. If I felt I had no obligation, of course I didn't [Tr. 648] say anything.

Q. Now, is there now, having gone through that, is there any procedure whereby a witness before a committee can get a subpoena quashed?

A. I say I haven't studied it. I judge I could quash a subpoena, certainly. The committee could, of course.

Q. Why didn't you answer his statement, I am a victim of an accident, then, or else quash the subpoena?

A. I don't recall anything about it, sir.

Q. Senator, what legislation was under consideration by the subcommittee at the time you called the witnesses from the New York Times in executive and public session?

A. Well, it was a study of communist infiltration and control of mass media of communications, and these hearings were communist infiltration in the press, newspapers, these particular hearings. It's a question that has been on study. You have got Constitutional limitations and we were seeing, first, if there had been infiltration; second, the extent of it. If we found those two things; third, what we could do about it within the Constitutional limitations.

Q. I repeat my question. What legislation did you have under consideration at this time?

A. Well, I have said we had no legislation. We had no

bills pending that I recall. Now, we could have. I wouldn't [Tr. 649] think so, though.

Q. You can't remember any legislation at all for which—

A. I said we could have. I don't remember any. I don't think so.

Q. You do not think there was any legislation—

A. It was a study of this question for the purpose of legislation.

Q. Well, what legislation in general or legislation in particular?

A. Well, now, we have never gotten agreement in committee, subcommittee, on anything. The hearings that you have mentioned last week are still part of this study.

Q. You cannot name one piece of legislation that you were considering at that time to which this information is relevant?

A. No, sir, I don't recall any. It's possible, but I don't remember. You see, we handle over fifty per cent of the bills introduced in the Senate, and there could have been bills pending, but I don't recall any bills that these hearings were directed at. But it was a study of this question to see what we could do if the facts existed that our information was as we believed to exist.

Q. You have indicated you can't remember any bills pending. Can you remember any legislation that was even [Tr. 650] suggested, if not pending, to which this might be relevant?

A. No, sir. As I said, as I recall, it was a study to see what we could do, the Constitution of the United States being what it is, and we first had to find out what the problem was.

Q. But you can't remember either pending legislation or legislation even suggested?

A. I don't know, sir. And don't misunderstand me, I don't remember that there was any.

Q. I take it your same answer would go to the question of—the two questions asked the witness Shelton that he didn't answer, for which he is now on trial, that you don't

remember any legislation that would be related to this or any even suggested?

A. I don't remember his answers. I don't remember his testimony.

Q. Well, I will now read you the questions that he is on trial for not answering and then ask you the question.

"Count One—Are you, sir, a member of the Communist Party U.S.A.?"

"Count Two—Did you ever have any conversation with Matilda Landsman?"

Can you indicate in any way the relevance of that to any pending bill or any legislation even under discussion that [Tr. 651] wasn't a pending bill?

A. I don't remember any pending bills. What the discussions were, I don't know.

Q. The answer is no, isn't it?

A. Well, the answer is I don't know. I don't recall.

Q. I am not clear whether I have your answer or not, Senator.

The Court: The Reporter will read the answer back.

(The last answer was read by the Reporter.)

Mr. Rauh: Would the Reporter please go back a few questions, because that doesn't bring it to my mind.

(The record was read by the Reporter.)

The Witness: I should have said I don't remember.

By Mr. Rauh:

Q. Can you now, Senator, state any legislation to which you feel those two questions are relevant?

A. The matter has been under study and—no, sir, I couldn't say that because I don't remember.

Q. No, I am not asking you what you recall. Let's get this question straight. I am asking you whether you can now, as of now, state what legislation you think these questions and answers would be relevant to? Can you now do it?

A. Well, of course I couldn't because I remember nothing

about it. I don't remember the witness, I don't remember the [Tr. 652] testimony.

Q. That is not the question, Senator.

A. Sir?

Q. The question is this: Can you now tell us any legislation to which those questions I read you and the answers would be relevant?

A. Can I now? No, sir. I don't know. At that time, I judge—well, I know they were very relevant.

Q. But you can't remember any legislation then or tell us any now, is that right?

A. No, sir; and the committee's reports since that time speak for themselves. We have made recommendations. I can't recall what they are.

Q. Senator Eastland—

A. We make recommendations every year. Now, what's been in those different recommendations, I think that report would be the best answer and would speak for itself.

Q. But you here can't tell us any legislation to which these answers would be relevant?

A. Not at this time—

Mr. Hitz: Excuse me, sir. I object. That is repetitious. We have gone over it many times.

Mr. Rauh: It's been answered. Thank you.

By Mr. Rauh:

Q. On May 2nd 1961, or thereabouts, on the floor of the [Tr. 653] Senate did you refer to the Watkins case, among others, as being pro communist?

A. I don't recall.

Q. Do you recall ever having listed the Watkins case, among others, as being pro communist?

A. I think so. I think I listed a number of cases as being pro communist, but when it was and what was in what I said at the time, the Congressional Record speaks for itself. I don't recall.

Q. I am just asking you now; not a date. I don't recall.

A. Well, you said in May, 1961.

Q. I just wanted to let you know that I had seen it.

A. Yes, sir.

Q. But now to ask it more generally, Senator, you do agree with me that you have called the Watkins decision pro communist?

A. I say I could have, yes. I think so.

Q. Now, at the time, therefore, prior to the Watkins case, when you were examining Mr. Shelton, presumably you were not following the Watkins case because that was pro communist?

A. Well, I can't answer anything about examining Mr. Shelton about something I don't remember.

Q. All right, let me put it this way—

A. I don't know whether I examined him, whether counsel [Tr. 654] examined him, or whether members of the committee examined him. I just don't remember.

Q. All right, let's try to clear it up. Do you remember you were there at the New York Times open hearings?

A. Oh, yes, I was there, but was in and out. I was there most of the time.

Q. You were there—if I tell you that the record shows you were there for the Shelton hearing, you will accept that?

A. I have been informed, yes, that the record shows that; and if it does, I was, of course.

Q. All right. Now, the Watkins case was decided in June, 1957. My question is very simple. Were you following the principles of that case back on January 6, 1956?

A. I don't remember at this time what the Watkins case held.

Q. But you do know you think it's pro communist, but you can't remember, is that right?

A. At the time I made that speech that you mentioned, yes. I discussed it and gave the reasons for it. I can remember making the statement, but what the reasons were I don't—I would have to refresh my memory.

Q. Senator, would you ordinarily be following a decision, the principles of a decision that you later said was pro communist?

[Tr. 655] A. Well, now, that is a question that I can't answer. I have done my duty as best I know how. We have

tried to be fair with all the witnesses who have come before us.

Q. Senator, in your entire—you just referred to the fact that you tried to be fair to all the witnesses that come before your committee?

A. Yes, sir, we have tried very hard to be fair with all the witnesses.

Q. Can you name a single witness who has ever said he didn't remember as often as you have said it this afternoon?

A. Well, I don't know, but there are very few men in this country, except a judge, that hears as many witnesses as I hear.

Q. I just asked a simple question.

A. Well, I know. I caught the implication in your question.

Q. I was asking you if you could name one witness before your committee that ever said, I don't remember, I don't recall, I don't know, as often as you said.

A. I can't answer that question. I don't know.

Q. You can't remember one person?

A. It's physically impossible for me to remember the hundreds of witnesses that I hear. I am just a normal human being, that's all.

[Tr. 656] Q. Senator, when did you first hear about an alleged letter from a confidential informant by the pseudonym of Finbar to the Senate Internal Security Subcommittee?

A. During this trial.

Q. During this trial?

A. Yes, sir.

Q. Did you first hear when you read Mr. Sourwine testified he destroyed it? Is that when you first heard it?

A. No, sir, I believe he told me.

Q. Mr. Sourwine told you?

A. Something about it. And then I read—

Q. When did he tell you that, Senator?

A. It was after he had testified.

Q. I thought you told us at the opening you hadn't discussed his testimony with him.

A. No, I didn't say that. I did discuss his testimony.

Q. Oh, you did discuss Mr. Sourwine's testimony with him?

A. In general, yes, sir.

Q. Well, the record alone will reflect whether you said that or not.

A. Well, yes, the record will reflect it. He told me he testified. I haven't been into details with him about what he testified.

Q. Did he tell you he testified he destroyed a letter?

[Tr. 657] A. Yes, sir, something about the letter. And then I saw a statement you made to the newspapers about it, to the papers about it. I read that.

Q. You saw a statement I made?

A. Yes, sir.

Q. You mean in cross-examining Mr. Sourwine?

A. Well, I couldn't tell you. I don't know. Yes, you said you were going to ask me what authority he had to destroy a letter.

Q. What authority did he have to destroy a letter, Senator?

A. He's got the same authority to destroy a letter that you have to destroy one in your own office that you don't think is any use.

Q. Was this Mr. Sourwine's office or the subcommittee's office, Senator?

A. Well, it's the subcommittee's office, of course, but, then, employees have got power.

Q. Well, now, is there a procedure for destroying documents?

A. I don't know of it if there is.

Q. Did you ever tell him he was authorized to destroy documents?

A. I never heard of this letter until this trial.

[Tr. 658] Q. Let's go to the other question. You said Mr. Sourwine had authority to destroy documents the way I have in my office. From whence——

A. I said if he considers that they are no longer useful.

Q. From whence does that authority come?

A. Well, now, frankly, I have never discussed it with him. I have never conferred any such power on him. I have

never taken any such power away from him. I have never discussed it, and I never heard of that letter until this trial.

Q. You have never given him——

A. But it's all right with me, when he thinks a document or a letter is no longer of any use, to destroy it.

Q. It was all right with you that he destroyed that document at the time the case was pending in the Court of Appeals?

A. I don't know when he destroyed it, sir. I knew nothing about that.

Q. It won't take me long to find out for you. I think it was in '58 or '9. Can we agree on that?

A. No, sir: he told me that it was when we moved from the one office building to the other.

Q. And when was that, sir?

A. I believe it was in '61. That is my best recollection. It was in April '61.

Mr. Rauh: We may want to give the Reporter a recess [Tr. 659] while I find this date, Your Honor. It's in the transcript.

The Court: All right, we will take a few minutes at this time.

(Brief recess.)

The Court: All right, gentlemen, you may proceed.

Mr. Rauh: At the recess, Your Honor, I was looking for a statement by Mr. Sourwine. I now have it, on page 335 of the record, of the transcript:

"I can, therefore, say now that the date of disposal of this letter was within a 90 day period after April 13, 1959. Roughly it would be fair to say it was in the second quarter of 1959."

By Mr. Rauh:

Q. This case was pending in the Court of Appeals at that time. Now, do you still think it was all right to destroy the document, Senator?

A. I don't know anything about it, Mr. Rauh. I don't

know what the letter was, I don't know what it meant or what it has to do with the hearing.

Q. Well, let me see if I can clarify that for you.

A. All right, sir.

Q. Page 143 of the first trial, record of the first trial, I asked for the letter in these words:

"The general principle that I was going [Tr. 660] on in asking for that letter is we made a prima facie case. It is a sheer matter of credibility. I do say here in all sincerity that I think we have made a prima facie case that there is no letter saying what Mr. Sourwine says are the contents of that letter. Now, I am not saying that there isn't a letter referring to a Shelton. It might even refer to Willard Shelton, for all I know. But I am saying there is no letter and that we have shown that, because if they had a letter like that, they wouldn't have issued a subpoena to a well known, definite and specific Washington newspaperman, and if they had a letter like that, Mr. Sourwine would never have cross-examined the defendant the way he did, and I want this letter to show that there wasn't probable cause to go after the defendant. I don't believe this letter exists in the terms in which Mr. Sourwine has stated. He admitted—he stated it from memory—he said he hadn't seen it for over a year. This is a sheer case of credibility."

In the light of the challenge to Mr. Sourwine's credibility on this letter, I ask you if you still think it was all right for him to destroy the letter?

[Tr. 661] Mr. Hitz: Excuse me. I object to that. It is wholly irrelevant what Mr.——

The Court: All right, the objection is sustained.

By Mr. Rauh:

Q. Would you have authorized the destruction of that letter if you would have known it related to Mr. Sourwine's credibility?

Mr. Hitz: The same objection.

Mr. Rauh: I would like to be heard on this, Your Honor.

The Court: All right, you may be heard.

Mr. Rauh: There is a serious question of credibility in this case of Mr. Sourwine. Mr. Sourwine has apparently destroyed this document without authority. I am trying to find out what kind of authority he had to destroy documents.

The Court: That may be, but the understanding of this particular witness that is presently on the stand is that he has no knowledge of the letter.

Mr. Rauh: I take it you sustain the objection.

The Court: I sustain the objection, yes.

By Mr. Rauh:

Q. Can you tell us anything at all, Senator Eastland, about the authority of any member of your staff to destroy documents?

[Tr. 662] A. Well, of course, I have never conferred authority. I judge that some authority goes with the position that a man holds, and I would judge that when he thought that a document or a letter had no further use he would have the right to destroy it.

Q. And that would be true even of a document which related to his own credibility?

A. You see, I can't go into that because I don't know anything about the letter. I never saw the letter, I never heard of the letter until this trial. And I think there is some mix-up in the dates because, as I recall, he told me it was destroyed when we were moving from the old Senate Office Building to the new Senate Office Building.

Q. When did he tell you that, Senator?

A. Yesterday.

Mr. Rauh: Mr. Reporter, would you please read the question and answer that I asked you to look up at the intermission?

The Reporter: Shall I read it?

The Court: Yes, you may read it.

(The Reporter read the record as follows:

"Question: Did you discuss Mr. Sourwine's testimony that he gave here with him?

"Answer: No, sir."

[Tr. 663] By Mr. Rauh:

Q. Do you want to change that, Senator?

A. What I meant was that I didn't go into the details of his testimony here. Of course I asked him if he testified, and I think I related several things that he told me. This letter business was one of them. In fact, the first time I heard about the letter was from him during this trial.

Q. It wasn't accurate, then, to say you hadn't discussed—

A. Then I read your statement—yes, I was accurate because I meant the details of his testimony here. I haven't been into that with him.

Q. You first said you hadn't discussed it at all. Now, how much did you discuss?

A. No, that is what I meant, that I hadn't gone into the details of his testimony with him. I haven't.

Q. Well, now, one thing came out, you discussed the letter. What else did you discuss with him?

A. Well, I asked him what day—I mean when the letter was destroyed, and he told me it was when we moved from one building to the other, that it was in a safe and that he found some personal stuff of Senator McCarran's in the safe.

My discussions with him have been principally to refresh my recollection about what happened at the hearing [Tr. 664] because I don't remember anything about the hearing. I believe he told me—yes, he told me that he testified that he had brought a number of names to me and that he wanted subpoenas and discussed in general terms what information they had before the subpoena was issued. I believe he told me that.

Q. Do you recall testifying at the trial of Seymour Peck?

A. I remember testifying in Judge Youngdahl's Court.

I don't remember the name of the witness—I mean the style of the case, excuse me.

Q. It was in Judge Youngdahl's Court back on May 22nd 1957. You do remember that?

A. Yes, sir, I remember testifying.

Q. Do you remember Mr. Telford Taylor examining you at that time?

A. Since you mentioned it, I believe he did examine me, yes, sir. I believe that is who it was.

Q. Page 227 of the transcript in the Peck case, Mr. Taylor says:

"I wanted to ask you to describe the circumstances under which it was decided that this subject—" that is, the communist infiltration of communications—"would be inquired into by the subcommittee."

[Tr. 665] Answer by yourself:

"Now wait a minute. Do you mean—"

"Question: The hearings involving mass infiltration.

"Answer: Infiltration of mass communications?

"Question: Mass communications, yes.

"Well, it was a subject that, under the title Strategy and Tactics of World Communism, we had been investigating for a number of years.

"Well, can you be any more specific about when it was decided to go into this field of mass communications?

"To go into the field of? No, I wouldn't know."

I take it, therefore, you have recollected this meeting you had since you testified in March 1957, is that correct?

A. No, sir. Was he one of the witnesses at these hearings?

Q. Yes. You didn't remember that subcommittee meeting at this time.

A. Well, I didn't connect the two up, but certainly, as I told you, we had—I couldn't hold a hearing until I got the approval of the subcommittee, because members of the subcommittee would object; and that is the way I remembered, that [Tr. 666] we would first get their approval.

Q. But you didn't remember it in '57, did you, Senator?

A. Oh, I don't recall the details of that, sir. We had Winston Burdett, I believe, in '55, in the summer of '55. I can remember his testimony.

Q. You testified at this same hearing, at page 232:

"We were investigating every communist cell in any business, in any profession, that we could find, and there were no specific instructions about mass communications. When we got information about a communist cell, wherever it was, we would see what facts could be developed and we would do that."

Do you remember——

A. Oh, yes, that is correct.

Q. That is correct. Do you remember this, your testimony:

"We were after each communist cell that we could find in any industry in the United States and we were after them to get a picture——"

A. Of course, that was our duty under Senate Resolution 366, and that is what we did, try to perform the responsibilities the Senate had placed on us.

Now, this one present subject is one segment of that overall duty; and generally we have investigated every communist [Tr. 667] cell that we could get information on, yes, sir, as a basis for legislation.

Q. Is it the purpose of the committee to get every cell past and present and the names of all the people in every cell?

A. We got what information we could, yes, sir.

Q. Is it your purpose to get as many names of communists as there were?

A. No.

Q. What is the purpose?

A. The purpose was, of course, to get the extent, get what they were doing, and see what legislatively we could do to hamper communist infiltration and domination in this country.

Q. Therefore, the purpose was to get all the cells and and all the people in the cells?

A. I say I think that the Senate Resolution 366 places that responsibility on the Judiciary Committee, and the Judiciary Committee has passed it on to the Internal Security Subcommittee.

Q. Do you remember in what authorization that was?

A. But this is just one segment of the overall picture. What you have asked me is the overall picture.

Q. That is correct. And is the overall picture, then, that the committee feels it should get all the cells past and present and all the people in them on the record?

A. On the record?

[Tr. 668] Q. Yes, so that you would—

A. Get full information, certainly. Where there is a conspiracy to overthrow the Government of the United States by force and violence, I think it is the duty of the Congress to pass appropriate legislation that can curb it. That is what we have tried to do. The Senate certainly has given the Judiciary Committee that power.

Q. Mr. Sourwine testified that 29 of the 35 witnesses called in executive session were present or past employees of the New York Times, and 15 of the 18 witnesses called in public session were past and present members of the Times, except for one, who was the brother of a present employee of the Times. Is that your recollection?

A. I knew most of the witnesses were employees of the New York Times. I can't tell you what number.

Q. But you did know most of them were from the Times?

A. Yes, sir.

Q. Senator, wouldn't you, just as you have said to so many witnesses, come clean once and tell us, isn't it a fact that the sole purpose was to get at the New York Times?

A. Why? No. Why?

Q. I asked you a question.

A. I said no. The answer is no.

Q. All right. That is your answer.

[Tr. 669] A. That's right.

Mr. Rauh: No further questions.

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[Tr. 20]

PROCEEDINGS

The Deputy Clerk: Criminal Number 825-62. United States versus Robert Shelton.

Mr. Hitz and Mr. Rauh.

The Court: Both sides are ready?

Mr. Hitz: Yes, your Honor.

The Court: In the case captioned United States of America versus Robert Shelton, upon the evidence adduced in the trial, the Court makes the following findings: That the Senate Judiciary Subcommittee conducting hearings in January of 1956, before which the defendant Robert Shelton appeared on January 6, 1956, was a duly constituted committee or Subcommittee of the Senate Committee on the Judiciary, authorized for the purpose of legislation to conduct study and investigate into communist infiltration in various phases of American life, and the subject under inquiry at these January 1956 hearings was communist activity in news media, and was clearly within the Subcommittee's authority to investigate;

That the subject under inquiry was known to the defendant Robert Shelton at the time of his appearance before the Subcommittee on January 6, 1956, and that the questions propounded to him, as recited in counts one and two of the indictment, were pertinent to the subject matter then under [Tr. 21] inquiry, and that while under oath the defendant was ordered and directed to answer these questions and the defendant refused to do so.

The Court, upon request of counsel in accordance with Rule 25 (c) has made or has written a memorandum opinion, making specific findings on all of the contentions that the Court feels are pertinent to the trial, and after full consideration it is the judgment of the Court that the defendant herein, Robert Shelton, is guilty as charged in Counts I and II of the indictment, the government having proved his guilt beyond a reasonable doubt.

The Court at this time files the original memorandum, and furnishes to counsel for the defense and for the prosecution the copies, and in the event that counsel for the

prosecution or the defense request additional copies, they are available.

Mr. Rauh: Your Honor please, the defendant is ready for sentencing, and counsel would appreciate being heard.

The Court: The Court will hear counsel for the defendant.

Mr. Rauh: Do you want the defendant to stand at this time?

The Court: No, I would like to hear the motion.

[Tr. 22] The Court is not disposed to sentence the defendant at this time. It has given no consideration to the matter.

The Court is of the opinion that you are to request that the defendant remain on bond?

Mr. Rauh: Well, I was going to argue the motion, or argue for a suspended sentence, and I would rather do so.

The Court: The Court would rather have an opportunity to go into the matter.

Mr. Rauh: All right, your Honor.

We would like to have the defendant remain on bond of One Thousand Dollars (\$1,000).

The Court: The defendant will remain on bond.

A presentence report will be prepared. Counsel for the defendant will be notified at a subsequent date, at which time the matter will be heard.

Is there anything further?

Mr. Hitz: Nothing by the Government.

Mr. Rauh: Nothing, your Honor.

(Whereupon, the instant proceedings were concluded.)

[Tr. 23] IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Criminal No. 825-62

UNITED STATES,

vs.

ROBERT SHELTON, *Defendant.*

Washington, D. C.

March 15, 1963

The above-entitled cause came on for SENTENCING, before the Honorable Leonard P. Walsh, Judge, at 10:00 o'clock a.m., March 15, 1963.

APPEARANCES:

For the Government: William Hitz, Esq., Assistant United States Attorney;

For the Defendant: Joseph L. Rauh, Jr., Esq., and John Silard, Esq., 1625 K Street, Northwest, Washington, D. C.

[Tr. 24] PROCEEDINGS

The Deputy Clerk: Criminal Number 825-62, United States versus Robert Shelton.

The Court: You may proceed.

Mr. Rauh: Your Honor please, we most respectfully suggest that this is the almost Hornbook case for suspension of sentence and placing the defendant on probation.

Mr. Shelton has never been arrested in his life with the exception of this event, but for the situation with this Internal Security Subcommittee his life would still be one not only without a conviction, but without an arrest.

He has a job, that is, I might say he has a job but they have been on strike for some time with the New York Times, but he has a job, and on Tuesday or thereabouts he will be called back to work.

He was, as your Honor yourself remarked in referring to Mr. Sourwine's testimony, a respectful witness before the Committee. When I pointed out, your Honor, that Judge Risley had made this comment, your Honor pointed out that Mr. Sourwine had also made the same comment.

There are, I believe, without question, serious legal questions in the case. Your Honor has ruled against us on all of our legal questions. I do not think your Honor ever [Tr. 25] suggested or does your Honor's decision suggest that some of these problems are not serious legal problems that one could raise in all good faith.

Fifth, Mr. Shelton will answer the questions if and when the legal situation should be decided against him.

This is not a case of arbitrary refusal to answer questions to one's government. It is a case of honest belief that he is not legally obligated.

I am authorized to state that if we should lose this appeal, he will voluntarily answer the questions. In other words, this is a legal matter he raises; not defiance of his government.

Sixth, finally I would respectfully suggest that there has been punishment to date. We have been seven years under a cloud, and one appeal all the way to the Supreme Court.

This has had an effect upon his career.

So for all six reasons, if your Honor please, there have been no arrests, he has a job, he was respectful, there are serious legal questions, he will answer the questions put to him if these legal questions are resolved against him, he has already been punished for all six reasons. We most respectfully request that the sentence be suspended and that he placed on probation.

[Tr. 26] The Court: Robert Shelton, do you want to say anything?

Defendant Shelton: No, your Honor.

The Court: Is there anything further, Mr. Rauh?

Mr. Rauh: No, your Honor.

The Court: The Court, having heard this case, presented by competent counsel on both sides, and having the benefit of the case having been tried on a prior occasion, and with

full recognition of the position of the defendant in this case, even with full recognition of his service from '44 to '46 in the Armed Services, the Court still feels that in fairness and under its obligation that this defendant may not be placed on probation.

The Court therefore commits the defendant, Robert Shelton, to the custody of the Attorney General or to his designated representative for imprisonment in an institution of his designation for a period of six months and a Five Hundred Dollar fine on Count One; and on Count Two, of six months and a Five Hundred Dollar fine, to run concurrently.

Mr. Rauh: Your Honor please, may the same amount of bond satisfy for the appeal?

The Court: It will.

Mr. Rauh: And may Mr. Shelton be in the custody—

The Court: Is the bondsman here?

[Tr. 27] Mr. Rauh: The bondsman is here. May we go make the bond here?

The Court: Have the bondsman step up.

(The bondsman stepped forward.)

Mr. Robinson, are you on the bond?

The Bondsman: Yes sir, your Honor.

The Court: You are the representative?

The Bondsman: Yes, sir.

The Court: The bond will be continued?

The Bondsman: The bond will be continued?

The Court: Yes. You will go down to the Clerk's Office and post a new bond.

The Bondsman: Post a new bond? Yes, sir. Appeal bond, is that right, your Honor?

The Court: Yes.

Mr. Rauh: It was a thousand dollars.

The Court: One thousand dollars.

The Bondsman: Thank you, sir.

Mr. Rauh: Mr. Hitz makes a suggestion that I would like to call to your Honor's attention, that sometimes a fine is attempted to be collected pending appeal, and, therefore, I

would request and I take it with Mr. Hitz' consent, that the levying of the fine be suspended pending the appeal; not [Tr. 28] suspended permanently in any sense, because your Honor has ruled against us on that point.

The Court: All right, the Court, then, will hold the levying of the fine and suspend that until such time as all of the proceedings have been terminated.

Mr. Rauh: Thank you, your Honor.

(Whereupon, the instant proceedings were concluded.)

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Filed February 1, 1963. Harry M. Hull, Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Criminal Case No. 825-62

UNITED STATES OF AMERICA

v.

ROBERT SHELTON

REQUEST FOR SPECIAL FINDINGS PURSUANT TO RULE 23(c)

Comes now the defendant by counsel and requests that the Court pursuant to Rule 23(c) find the facts specially on the following subjects:

1. If the Court holds, as we urge, that a Subcommittee of Congress must have probable cause to believe that a witness has relevant information to give the Subcommittee on its subject of investigation before it issues a subpoena for his appearance, what probable cause did Chairman Eastland have for subpoenaing the defendant into the Executive hearings on December 7, 1955?

2. What probable cause did the Subcommittee Chairman have on January 6, 1956 at the time he overruled defendant's objections?

3. Did the Subcommittee interrogate any of the witnesses at the hearings at which defendant testified in January, 1956, solely because they were employees of the New York Times on the theory that any employee on the Times might have information about Communism?

4. If the Court holds, as we urge, that the Subcommittee Chairman had an obligation to respond to the defendant's objections, including his objection that he was a victim of accident, did the Subcommittee Chairman carry out this obligation?

5. What was the question under inquiry at the time of defendant's interrogation before the Subcommittee on January 6, 1956?

6. In the absence of any prior Subcommittee meeting, how did the question under inquiry (finding under question 5) get to be the question under inquiry before the Subcommittee on January 6, 1956.

7. Is the question under inquiry presently alleged against the defendant either inconsistent with or different from the question under inquiry stated in the prosecution's bill of particulars of December 21, 1956?

8. Does the bill of particulars given by the prosecution on December 21, 1956 with respect to the "question under inquiry" estop the prosecution from proving the presently alleged "question under inquiry" and, if not, then why not?

9. What, if any, was the legislative purpose of the hearings of the Subcommittee on January 6, 1956 and how did the questions asked defendant relate to that legislative purpose?

10. During January of 1956 what Senate resolution or rule authorized the Internal Security Subcommittee of the Committee on the Judiciary, to hold hearings investigating Communism in news media?

11. If no resolution or rule of the United States Senate directly authorized the inquiry referred to in the previous question, but such authorization was granted to the Committee on the Judiciary, then what resolution or rule of the Committee on the Judiciary delegated to its Internal Security Subcommittee the investigative and subpoena authority vested in the Judiciary Committee by the action of the Senate?

12. Did defendant's right to produce defense testimony through Senator Hennings, his right to produce rebuttal testimony through cross-examination of Subcommittee Chairman Eastland, who could recall nothing of the 1956 hearings, and his right to production of any documents, suffer any impairment by the seven-year delay prior to this trial?

13. If the answer to the previous question is in the affirmative, then has defendant's constitutional right to a speedy trial been violated in this case?

Respectfully submitted

s/JOSEPH L. RAUH, JR.

s/John Silard

1625 K Street, N. W.,

Washington 6, D. C.

Attorneys for Defendant

Filed February 15, 1962. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Crim. No. 825-62

UNITED STATES OF AMERICA

v.

ROBERT SHELTON

MEMORANDUM

The defendant herein, Robert Shelton is before the court on a two count indictment charging him with contempt of Congress, Title 2, United States Code, Section 192.

The indictment alleges that on January 6, 1956, defendant appeared as a witness before the Subcommittee on Internal Security of the Senate Judiciary Committee, conducting an investigation and inquiry into communist activities in news media, that when ordered and directed by the presiding officer of the Subcommittee to answer certain questions, defendant refused to do so, and that the pertinent questions included the following:

"COUNT ONE

"Are you, sir, a member of the Communist Party U.S.A?"

"COUNT TWO

"Did you ever have any conversation with Matilda Landsman?"

Defendant does not deny that he did appear before the Subcommittee on January 6, 1956, and while under oath and after being ordered and directed to answer said questions by the presiding officer, he refused to do so.

In defense of these charges the defendant maintains the questions, by their very nature, violate his First Amendment rights, and he was justified in refusing to answer them

since the Subcommittee was acting in excess of its authority (1) in calling him at all since he was a victim of accident and the Subcommittee had no probable cause or reason to call him; (2) the authority of the Subcommittee to conduct the hearings has never been established, nor is it made clear in the indictment; and (3) the question under inquiry was not clear and is not clear now.

At the conclusion of the government's case, and again at the close of the entire case, defendant moved for judgment of acquittal on the grounds that (1) the government has failed to prove the Subcommittee had probable cause to call him as a witness or that it had reason to believe he had information of value to the Subcommittee; (2) the government failed to establish the Subcommittee's authority to hold the hearings; (3) the government failed to prove the question under inquiry or that the defendant was aware of what the question under inquiry was; (4) the government should be estopped from relying on a subject under inquiry different from that relied upon at the first trial, as then stated in the government's bill of particulars; (5) that defendant is entitled to acquittal for lack of a speedy trial; and (6) that defendant is entitled to an acquittal by reason of the court's refusal to attach Senator Eastland.

The court denied each motion for judgment of acquittal on the points as set out above and on other points raised by defendant during trial.

The court has given careful consideration to each question raised by defendant at every stage of the trial and will discuss each which it deems necessary in this opinion.

The defendant, in open court, chose to waive his constitutional right to trial by jury and elected to be tried by the court, and as in any criminal case, whether tried by the court or to the jury, the government must sustain the burden of proving, beyond a reasonable doubt, each allegation of the indictment, the presumption of defendant's innocence remaining throughout the trial.

As to this offense, the government must prove each element of the offense charged, that is,—that the defendant appeared, under subpoena, as a witness before a duly authorized congressional committee; that while under oath,

he was directed and ordered to answer the questions set out in the indictment; that the specific questions were pertinent to matters under inquiry by the Subcommittee; that defendant was aware of the matter under inquiry; that the subject of the inquiry was in furtherance of a proper congressional purpose, and within the authority of the Subcommittee to investigate; and that defendant refused to answer said questions when directed and ordered to do so.

Much has been said with respect to the subpoena issued commanding the defendant's appearance before the Subcommittee on January 6, 1956. Defendant maintains he was a victim of accident, a subject of indiscriminate dragnet procedure since the Subcommittee lacked probable cause or reason to call him.

The evidence adduced by the government established that prior to calling the defendant the Subcommittee had information as to communist activity in news media, and particularly in the newspaper field, given by a newspaper correspondent, Winston M. Burdett; that subsequent to Mr. Burdett's testimony and prior to calling the defendant, the Subcommittee had subpoenaed one Matilda Landsman, who was known to the Subcommittee as an employee of the New York Times, and who, on the direction of the Communist Party, had downgraded her job from news work to the press room to do colonizing work among the typographical employees. (Gov. Ex. 11).

Neither Mr. Burdett nor Miss Landsman had made mention of the defendant in their testimony. However, the record discloses that prior to defendant's appearance before the Subcommittee at its executive session in New York City on December 7, 1955, a letter from a source found to be reliable in the past had been received by the general counsel of the Subcommittee, which stated that one "Shelton" of the New York Times was informed about if not active in Communist Party activities in news media. This letter, however, was destroyed in 1959, along with other material not connected with this case, at the time the records of the Subcommittee were moved from the Old Senate Office Building to new quarters, and therefore was not in existence at

the time of this trial. Nevertheless, it is clear to the court, from the testimony of Senator Eastland that the calling of the defendant was not predicated upon the existence of the letter, as the Senator, who had authorized the issuance of the subpoena, testified that he had no knowledge of such a letter until this trial (Tr. p. 657).

Further, the record discloses defendant was a working member of the press at the time he was called to testify, and was employed on the same newspaper as several other witnesses called by the Subcommittee, which at that time unquestionably had information which indicated communist activity in attempting to infiltrate news media.

There is complete lack of authority for defendant's contention that a committee of Congress must have "probable cause" to call a witness to testify before it, or, at least, must disclose any reason the committee may have should a witness raise the question. Nevertheless, were it true that "probable cause" need be shown, certainly the Subcommittee had sufficient reason to call this defendant.

In support of his contention, defendant cites *Wilkinson v. United States*, 365 U.S. 399, at 412, where the Supreme Court stated:

"It is to be emphasized that the petitioner was not summoned to appear as the result of an indiscriminate dragnet procedure, lacking in *probable cause for belief* that he possessed information which might be helpful to the subcommittee." (emphasis added)

Similar language is also found in *Barenblatt v. United States*, 360 U. S. 109, at 134. To maintain that such is authority for the proposition that Congress need "probable cause" to call a witness similar to the probable cause required of the police for arrest is indeed a strained analogy. Clearly the court's reference to "probable cause" as recited above was a relation to the fact that no evidence of dragnet procedure or pillory of witnesses had been established in the *Wilkinson* or *Barenblatt* cases. In no manner do these cases impose an affirmative requirement on Congress to show "probable cause" before subpoenaing a witness.

Were such the case, unquestionably it would stifle the investigative powers of Congress and bind its legislative hands.

Surely it is not for the judiciary to impose such restrictions upon Congress, for not even in our judicial system is such a showing required before a witness is subpoenaed to testify. The constitutional doctrine of separation of powers establishes rightful regard and respect for the authority of the legislative branch of our government and would restrain judicial evaluation of matters clearly within the discretion of the Congress.

As the Supreme Court stated in *Wilkinson v. United States*, *supra*, at page 412:

"Moreover, it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner. As was said in *Watkins*, *supra*, 'a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served.' 354 U. S., at 200. See also *Barenblatt*, *supra*, 360 U. S., at 132."

Nor is there one scintilla of evidence in this case of dragnet procedures or pillorying or indiscriminate calling of any witness by the Subcommittee. Were that the case, different constitutional questions would come into play, but they are not present here.

As was stated in the Circuit Court's opinion in affirming the conviction of this defendant on the first trial of this case:

"Information about Communists is not the exclusive property of Communists. . . .

"... After the important revelations of Winston M. Burdett, it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees. . . ." 108 U. S. App. D. C. 153, 160, 280 F. 2d 701.

It is the opinion of this court that Congress need make no showing of probable cause or reason to subpoena a witness to testify before one of its authorized investigative bodies, but even were this so, the facts of this case clearly establish cause to call this defendant.

With further reference to this matter, at the time of his appearance before the Subcommittee on January 6, 1956, and before being sworn, defendant read a statement in which he claimed to be a victim of accident. This, he maintained, should be considered as a request for the Subcommittee to tell him why he was called. While the court does not agree with such an interpretation, for the purposes of this case it is accepted.

Need the Subcommittee tell him "why he is called?" Would an answer, "Because the Subcommittee believes you have information, as a working member of the press," suffice? Surely this question rises to the motives for calling the witness and falls to no better fate than that of the argument on probable cause. But, again, the record in the case settles the argument here. The statements of the defendant himself at the executive session hearing in New York City in December, 1955, reveal he was fully aware of why he was called:

"Therefore, gentlemen, in asking me, . . . 'Have I any knowledge of Communist activity . . . in the newspaper field . . . :'" (Tr. 178, 179).

And, at the open hearing in Washington, D. C., on January 6, 1956, defendant stated:

"I challenge the jurisdiction of the committee to call me . . . my testimony in executive session makes it clear that the committee will obtain no information from me . . .

"Furthermore, I fail to see why I am involved in this hearing which the Chairman said on Wednesday stems from the Burdett testimony. (Tr. 222, 223)

"

" . . . no other governmental body . . . would call a

newspaperman and demand to know his . . . associations.
(Tr. 231)

“ . . .
“ . . . At the executive hearings the committee counsel tried without success to link me with a certain New York newspaper. He was unable to establish any connection . . . Yet I have been called back here today. . . .” (Tr 233)

Assuming therefore, though there be a complete lack of authority for the proposition, that it is incumbent upon Congress to tell a witness why he has been called when the witness states he is a “victim of accident,”—the record here clearly establishes this defendant was fully aware of why he was there.

With respect to the authority for and the actual issuance of the subpoenas for the appearance of defendant, first at the executive session hearing in December, 1955, and second, at the open hearing in January, 1956, the record discloses the following:

Initially a subpoena was issued in the name of Willard Shelton to appear at the executive sessions in New York City in December, 1955. However, the defendant did not respond to that subpoena. Subsequently a subpoena was issued in the name of Robert Shelton to appear at the executive hearing in New York City in December, 1955, and defendant did respond to this subpoena, as he did to the subpoena issued for his appearance at the open hearing in Washington in January, 1956.

Senator Eastland, Chairman of the Subcommittee which subpoenaed the defendant, testified he authorized the issuance of the subpoena from lists of persons, one of whom was the defendant, after he had discussed with Julian G. Sourwine, the Subcommittee's chief counsel, what information they could expect from the witnesses:

“We discussed what information he [Sourwine] had, and it was up to me to determine whether to subpoena them or not, and that is what I did.” (Tr. 636).

Surely the undisputed testimony of the chairman of the Subcommittee alone speaks for the authoritative issuance of each of the subpoenas directed to the defendant.

To establish the authority of the Subcommittee to hold hearings, the government introduced the following:

(a) Senate Resolution 366, 81st Congress, 2nd Session, 1950, the enabling resolution which conferred original authority upon the Senate Judiciary Committee, or any duly authorized subcommittee thereof, to make complete study and investigation of (1) the administration, operation and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature and effects of subversive activities in the United States, etc., Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of a foreign government or organization controlling the world communist movement or any other movement seeking to overthrow the Government of the United States by force and violence. (Gov. Ex. 1).

(b) Senate Resolution 58 of February 18, 1955, continuing the original authority of the Judiciary Committee, or its authorized subcommittee (Gov. Ex. 2a) accompanied by Senate Report 34 of February 21, 1955 (Gov. Ex. 2b) and Senate Report 49 of March 10, 1955 (Gov. Ex. 2c).

(c) Copies of the minutes of the Senate Committee on the Judiciary for January 20, 1955, wherein the subcommittee in question was by resolution continued during the 84th Congress (Gov. Ex. 3).

(d) Minutes of February 7, 1955, listing the Senators appointed to serve upon the Subcommittee on Internal Security (Gov. Ex. 4).

(e) Senate Resolution 174 (Gov. Ex. 7a) and Senate Report 1385 (Gov. Ex. 7b), which lend additional approval of the Senate Committee on the Judiciary and its duly authorized subcommittee to investigate the Internal Security Act of 1950, etc.

Government Exhibit 8 is a printed copy of the transcript of the open hearings of the Subcommittee in Washington, D. C., on January 4, 5 and 6, 1956, at which defendant appeared.

Government Exhibit 10 is the certification of defendant's contempt by the United States Senate to the United States Attorney for the District of Columbia, and the attached copy of Senate Resolution 253, ordering such certification, and Senate Report No. 1954, 84th Congress, 2nd Session, 1956, setting out the proceedings before the Subcommittee giving rise to the citation.

From these exhibits and the testimony adduced at the trial the Court finds that Senate Resolution 366 established in clear and unequivocal terms the original authority of the Senate Judiciary Committee, and its duly authorized Subcommittee, to investigate communist activities and infiltration of various fields of American life, and congressional awareness and continuing approval is evidenced by the numerous reports and repeated appropriations for the work of the Subcommittee.

The Subcommittee conducting the hearings in question was duly constituted and authorized to study and investigate communist infiltration and activities in various phases of American life, and the subject under inquiry was proper and within its investigative authority. The Subcommittee's awareness of communist infiltration in news media, the subject under inquiry at these hearings, having been brought into focus by the testimony of Mr. Burdett in June, 1955, demanded the Subcommittee's further investigation into the matter.

With respect to the disclosure of the question under inquiry as set out in the indictment, the record discloses that at the hearing on January 6, 1956, but prior to the defendant being called to testify, Senator Hennings, then a member of the Subcommittee, commented as follows:

"I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts, or, indeed, all consummations of efforts

of the Communist Party to infiltrate newspapers or other media of communication." (Gov. Ex. 8, p. 1718).

The defendant himself in his statement to the Subcommittee at the January 6th hearing said:

"I challenge the jurisdiction of the committee . . . my testimony in executive session makes it clear that the committee will obtain no information from me. . . ."

"Furthermore, I fail to see why I am involved in this hearing, which the chairman said on Wednesday, stems from the Burdett testimony. There was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles." (Gov. Ex. 8, p. 1720).

This latter statement by the defendant refers to the statement of the chairman upon the opening of the hearings on January 4, 1956, in Washington, D. C.:

"The hearings we are about to open stem from sessions of this subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster." (Gov. Ex. 8, p. 1587)

This statement was followed by a comment of Senator Hennings:

"Of course, the committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news dispensing agency." (Gov. Ex. 8, p. 1588).

These statements of the chairman and of Senator Hennings establish that the Subcommittee was then engaged in attempting to ascertain at this inquiry the extent and nature of communist infiltration into news media.

Defendant's awareness of the purpose of the hearings is revealed by his own statement to the Subcommittee at the commencement of his testimony. Nowhere did he assert to

the Subcommittee the question under inquiry was unknown or too vague, nor that the questions propounded were not pertinent to the subject under inquiry.

On the contrary, defendant sharply criticized the Subcommittee for what he maintained was an infringement upon the freedom of the press:

".... However unknowingly or unwittingly, gentlemen, in the quest for internal security, you are threatening long-standing and hard-won American liberties

"..... This subcommittee is nudging the end of my copy pencil, it is peeking over my shoulder as I work soon it will be looking into newsrooms all over the country." (Gov. Ex. 8, p. 1723).

Defendant's contention that he was not aware of the topic and subject under inquiry is without merit. As stated, defendant did challenge the authority of the Subcommittee, but he did not ask that the subject be stated nor object to the questions on the grounds of pertinency, and he cannot now be heard to complain as to the pertinency of the questions. *Watkins v. United States*, 354 U. S. 178.

Nevertheless, certainly the first question set forth in the indictment was proper and pertinent to the subject matter under inquiry. *Barksy v. United States*, 83 U.S. App. D. C. 127, 167 F. 2d 241, cert. den. 334 U.S. 843.

The second count question was directed to any conversation defendant may have had with Matilda Landsman (See Gov. Ex. 11) who worked on the same newspaper as the defendant, and who, upon direction of the Communist Party, downgraded her job from news work to the press room in order to do "missionary work with the typographical employees. Surely on these facts the pertinency of this question to the subject matter under inquiry is also established.

Defendant maintains that the very nature of the questions recited in Count One and Count Two of the indictment violate his First Amendment rights under the Constitution of the United States, and essentially that such is an impairment to the freedom of the press and all those engaged in that activity. Indeed, freedom of the press is one of the

great freedoms of our democracy and justly extends to all forms of news media. That right, however, is not impaired by congressional inquiry into an abuse of its use.

Certainly no one would question the right of the government of the United States through its respective branches to preserve and protect itself from those seeking to destroy it. One need only look to present world conditions to understand and appreciate the constant vigilance required by our government to insure this country and its many great individual freedoms from the hand of oppression. In such matters public interests require that individual rights yield to the superior right of Congress to ascertain facts.

Nevertheless, aside from these considerations, the record before the court discloses no inquiry into the press. The Subcommittee's inquiry was directed at communist activity in news media and nothing more. Necessarily, newspaper personnel were called before the Subcommittee, but this did not change the purpose or intent of the inquiry. Therefore, from the evidence adduced at the trial, the court finds no abuse of the defendant's First Amendment rights, and further that any balance of rights under these facts must be weighed in favor of the superior right of Congress to make inquiry and investigate.

Further, this court has no doubt that these hearings were conducted in furtherance of a legislative purpose, and within an area subject to the legislative powers of Congress. Failure to show that legislation was actually enacted in no way vitiates the lawful exercise of the Congressional power to investigate.

Defendant contends that the certificate of contempt by the United States Senate to the United States Attorney is invalid under 2 U. S. C. 194, because it fails to carry the signature of the present presiding President of the Senate. Defendant cites no authority for this contention, and the court's research discloses no such authority.

Examination of this document (Gov. Ex. 10) shows the certificate to be signed by the presiding officer of the Senate at the time the document was executed in May, 1956, which is in keeping with the provisions of 2 U. S. C. 194. The court therefore finds this document to be properly executed pur-

suant to 2 U. S. C. 194, and the defendant's contention to be without merit.

The defendant's contention of lack of speedy trial was heard and disposed of prior to trial and is amply discussed in the memorandum filed herein on December 19, 1962, by Judge Luther Youngdahl. The motion was again raised at trial and denied. This court, in joining with Judge Youngdahl's opinion, is definitely of the opinion that the defendant herein has not been denied a speedy trial. Any lapse of time between the first trial and the present trial is wholly attributable to the ordinary process of trial and appellate procedure. Defendant's contention that government error in the first indictment has occasioned the second trial of the matter is certainly no ground for acquittal. Nor is there any showing in the record before this court of any prejudice to the defendant in his defense of the charges which was occasioned by the lapse of time between trials.

Further, with reference to this subject, the defendant moved for acquittal when the court refused to issue a body attachment for Senator James O. Eastland, for failure to appear in response to a subpoena which defendant had issued on January 15, 1963, returnable on January 16th, and reissued on January 16th returnable at 3 p.m. that same day.

As to the issuance and service of this subpoena, Mr. James Mattingly, Assistant Deputy United States Marshal, and Mr. William O. Hoch, Chief Deputy United States Marshal, stated in open court, and in an affidavit submitted and read to the court, that on January 15, 1963, at 3:36 P. M., a subpoena was filed directed to Senator Eastland and returnable on January 16, 1963 at 2 P. M.; that upon receipt of the subpoena, and in accordance with long-standing procedure, Mr. Hoch called the Office of the Sergeant at Arms of the United States Senate, but received no answer; that the following morning, January 16th, 1963, at approximately 9:30, Mr. Hoch again called the Office of the Sergeant at Arms and informed the Assistant Sergeant at Arms of the subpoena; that the Assistant Sergeant at Arms advised Mr. Hoch he would try to locate Senator Eastland and would call back; that later that same day he did call back and in-

formed Mr. Hoch that Senator Eastland was out of the city, whereupon Mr. Hoch noted "not to be found" and "out of town" on the subpoena and returned it to the court.

Further, that on the following day, January 17th, at approximately 1:30 P. M., the same subpoena was reissued for service, but the return date on said subpoena had been changed to January 17th at 3 P. M.; that Mr. Hoch thereupon called the Office of the Sergeant of Arms and advised the secretary he had a subpoena for Senator Eastland, and requested that he be advised as soon as possible as to obtaining service on the Senator; that about 4:00 P. M. that same day, Mr. Cheatham of the Office of the Sergeant at Arms of the Senate called and Mr. Hoch advised Mr. Cheatham the court was in recess awaiting some words as to the service of the subpoena on Senator Eastland; that Mr. Cheatham stated he would check to see if the Senator was on the Floor of the Senate or in his office, and would call back; that Mr. Cheatham did not call back that day; that at approximately 5:45 P. M., Mr. Mattingly relayed to the court what had transpired and that the return time on the subpoena had expired, and thereupon the court directed Mr. Mattingly to change the return date of the subpoena to January 18, 1963, at 10 A. M., and to add "or a time convenient to the Senator."

Further, than on January 18th, Mr. Hoch received a call from Mr. Cheatham, and informed Mr. Cheatham of the new return date and other change in the subpoena; that Mr. Cheatham requested the subpoena be sent to the Office of the Sergeant at Arms of the Senate for service on Senator Eastland; that later that day the Deputy United States Marshal, who had taken the subpoena to the Sergeant at Arms' Office, advised that the Sergeant at Arms had been authorized to accept service on behalf of the Senator.

During this period the United States Senate was in session. Senate Rule V and parliamentary procedure require Senate approval before a Senator may absent himself from that body when it is in session, and since the court was hearing this case without a jury, the court respite the trial until Senator Eastland could process a Senate Resolution giving him permission to take leave of the Senate, then in ses-

sion, for the purpose of appearing in court in response to the subpoena. The record is quite clear that the Senator had every intention of honoring the subpoena and did so immediately upon gaining approval of Senate Resolution 53.

Further, as to defendant's contention that the court should have issued a body attachment for Senator Eastland, Article I, Section 6, Clause 1, of the Constitution of the United States, states:

"Senators and Representatives . . . shall in all cases, except Treason, Felony and Breach of the Peace, *be privileged from arrest during their attendance at the sessions of their respective Houses*, and in going to and returning from the same. . . ." (emphasis added).

This clause clearly and unequivocally grants privilege from arrest to Senators and Representatives for failure to respond to a subpoena served upon them during sessions of their respective houses. This privilege of course goes not to the individual but to the position he holds, in respect to the millions of people he represents and the Senate as a body.

From these facts the court finds no delay affecting the rights of the defendant.

The defendant further argues that the government should be stopped from changing its position with respect to the question under inquiry. Initially, it must be borne in mind that there is a new indictment in this case, and the point that defendant refers to as the statement of government counsel in answer to a request for a bill of particulars on the first indictment, and not the indictment presently before this court. The statement referred to by defendant is in part as follows: "This committee was conducting the inquiry for the purpose contained in the resolution, and no lesser purpose." (Tr. 65). In light of this statement, defendant maintains the government should be estopped from saying the question under inquiry was "Communist activities in news media," which is narrower in scope than the full resolution.

Admittedly the Supreme Court in *Russell v. United States*, 369 U. S. 749, reversed the defendant's conviction

on the first indictment, finding that indictment faulty in that it failed to set out the precise question under inquiry. In compliance with that decision the government has stated in more specific terms the charges in the indictment, which in no manner changed the actual fact of what the question under inquiry by the Subcommittee was on January 6, 1956. That is abundantly clear from the record before the court, as is the fact that the government has proved beyond reasonable doubt the question under inquiry. The government has done no more than narrow the issues from the full resolution to the specific inquiry into communist activities in news media.

Further, it is difficult for this court to see any prejudice to the defendant at this trial arising from government counsel's oral statement at the hearing on a motion for a bill of particulars, on a different indictment, which has since been found faulty by the Supreme Court. What counsel said then in no manner alters the facts presently before the court with respect to what took place at the Subcommittee hearings in January, 1956. The court therefore finds this contention of the defendant to be without merit.

Upon the evidence adduced at trial the court finds that the Senate Judiciary Subcommittee conducting hearings in January, 1956, before which the defendant appeared on January 6, 1956, was a duly constituted Subcommittee of the Senate Committee on the Judiciary, authorized for the purpose of legislation to conduct study and investigation into communist infiltration in various phases of American life, and that the subject under inquiry at these January, 1956, hearings was communist activities in news media, and was clearly within the Subcommittee's authority to investigate; that the subject under inquiry was known to the defendant at the time of his appearance before the Subcommittee on January 6, 1956; and that the questions propounded to him, as recited in Counts One and Two of the indictment, were pertinent to the subject matter then under inquiry; and that while under oath the defendant was ordered and directed to answer these questions, and that he refused so to do.

The court has considered other points raised by the de-

fendant, as well as those discussed above, and upon the evidence adduced at trial finds them to be without merit.

It is the judgment of this court, upon the evidence adduced at trial, that the defendant is guilty as charged in Counts One and Two of the indictment beyond a reasonable doubt.

LEONARD P. WALSH,
Judge

Filed March 15, 1963. Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Criminal No. 852-62

UNITED STATES OF AMERICA

vs.

ROBERT SHELTON

NOTICE OF APPEAL

Name and address of appellant: Robert Shelton, 191
Waverly Pl., New York 14, N.Y.

Name and address of appellant's attorney: Joseph L.
Rauh Jr., 1625 K St., N.W., Washington, D.C.

Offense: Contempt of Congress (2USC192)

Concise statement of judgment or order, giving date,
and any sentence: Convicted, Sentenced, March 15, 1963:
6 months and \$500 on each Count Concurrently.

Name of institution where now confined, if not on bail:—

I, the above-named appellant, hereby appeal to the United
States Court of Appeals for the District of Columbia Circuit
from the aboved-stated judgment.

Date: March 15, 1963.

ROBERT SHELTON,
Appellant.

JOSEPH C. RAUH, JR.,
Attorney for Appellant.

WILBUR K. MILLER

Monday, September 23, 1963

MWLN

10⁰⁰ am

45 minutes
BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
CLERK

No. 17,904

ROBERT SHELTON, *Appellant*,

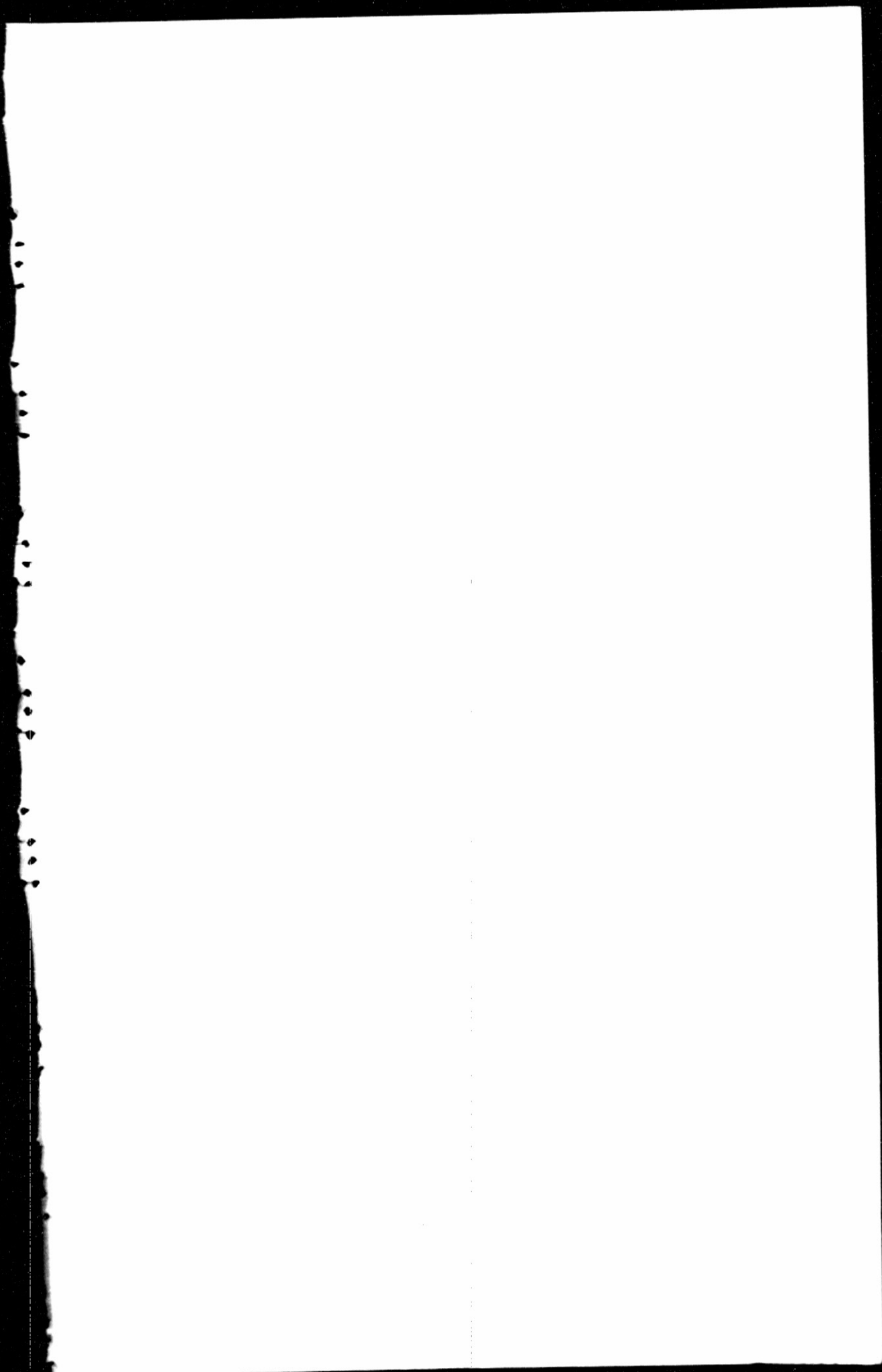
v.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

JOSEPH L. RAUH, JR.,
JOHN SILARD,
DANIEL H. POLLITT,
1625 K Street, N. W.,
Washington 6, D. C.

MELVIN L. WULF,
156 Fifth Avenue,
New York 10, New York,
Attorneys for Appellant.



**APPELLANT'S STATEMENT OF QUESTIONS
PRESENTED**

In January of 1956 appellant appeared in response to a subpoena and testified before the Internal Security Subcommittee of the Judiciary Committee of the United States Senate at its "N. Y. Times hearings," but refused to answer certain questions, for which refusal he was indicted and convicted of contempt under 2 U.S.C. § 192. This case, involving the Committee's "victim of accident" subpoena, is here for a second time following Supreme Court reversal of a prior conviction. The questions presented by this case are:

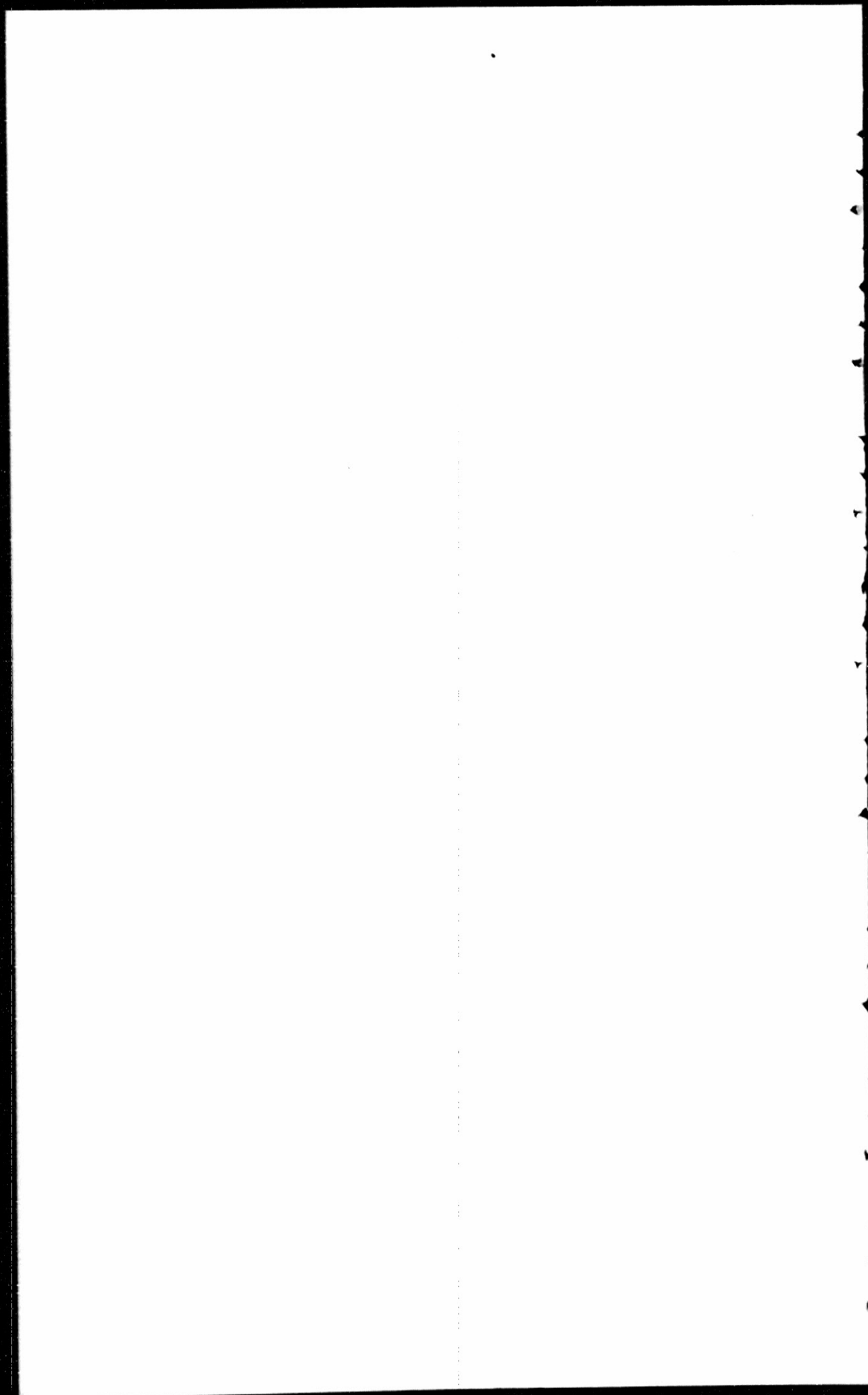
1. May the Internal Security Subcommittee, consistent with the Fourth Amendment and Fifth Amendment due process, subpoena a witness without cause to believe that he has been affiliated with or is knowledgeable about Communism, and can it insist upon his testifying although it declines to inform him of why he has been called?

2. In a contempt prosecution may the Government reverse its position on the "question under inquiry" given by a bill of particulars seven years earlier, when witnesses have meantime died and recollections faded with consequent prejudice to the accused's right to rebuttal?

3. Was there the requisite delimited "question under inquiry" before the Internal Security Subcommittee at the time of appellant's appearance?

4. Can appellant properly be convicted of contempt for refusing to answer questions which infringe upon his First Amendment rights?

5. May appellant be convicted of contempt although the Committee in its hearing transgressed its own rules and those of the Senate with respect to the holding of hearings and subpoenaing of witnesses?



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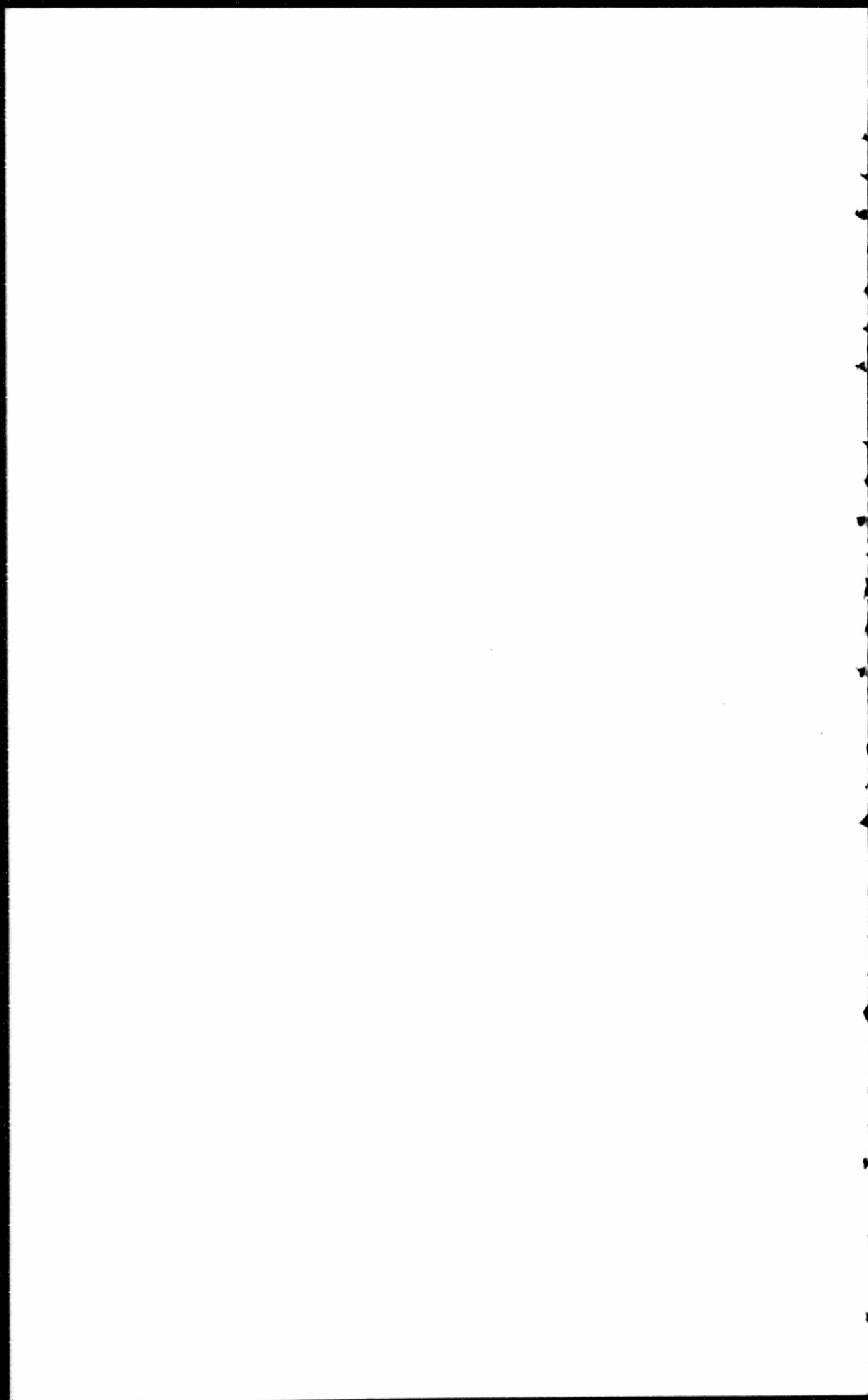
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,904

ROBERT SHELTON, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF FOR APPELLANT

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

Jurisdictional Statement

This is an appeal from a conviction and sentence in the United States District Court for the District of Columbia. This Court has jurisdiction under 28 U.S.C. § 1291. Jurisdiction of the case below is based on 18 U.S.C. § 3231.

Statement of the Case

The present case is one of those arising from the 1956 New York Times hearings of the Senate Internal Security Subcommittee, and presents to this Court questions as profound as any which have arisen in recent years out of

Congressional committee hearings. An earlier conviction against appellant flowing from these same hearings resulted in an affirmance here (see 108 App. D. C. 153, 280 F. 2d 701), but the Supreme Court granted certiorari on the principal issues and reversed with other pending cases on the common ground that the indictments had failed to set forth the question under inquiry. *Russell et al v. United States*, 369 U.S. 749.

Robert Shelton, appellant herein, has been a copy editor on the New York Times, for some twelve years (J.A. 45).¹ Following a subpoena issued to newsman Willard Shelton at the Times, Robert Shelton's name was substituted on the subpoena. Appellant was then called, together with various colleagues on the New York Times and others, and questioned in executive session of the Internal Security Subcommittee of the Senate Judiciary Committee on December 7, 1955 and again in open session of that Subcommittee on January 6, 1956. There is no reference whatsoever to the appellant, derogatory or otherwise, in any of the hearings of the Internal Security Subcommittee (hereinafter referred to as the Committee) either before or after his appearances before that Committee, which might explain why he was selected for Committee interrogation.

At the December executive session and again at the January open session of the Committee, appellant refused to answer questions addressed to him on the subject of Communism and Communist associations; he did so on the grounds that, having been subpoenaed as a "victim of accident," there was no reason or justification for his interrogation (J.A. 79); that the questioning violated his First

¹ Appellant makes reference in this brief to the Joint Appendix which is designated as "J.A." and to the Record from the previous trial printed in the Supreme Court, designated herein as "R," a copy of which has been filed with the Clerk of this Court.

Amendment rights (J.A. 82); and that the questions were beyond the jurisdiction of the Committee (J.A. 73, 82). Appellant was indicted in November 1956, and convicted in January 1957 for refusing to answer two questions at the January 1956 open session: (1) "Are you, sir, a member of the Communist Party U.S.A.?", (2) "Did you ever have any conversation with Matilda Landsman?" (R. 214).

Following the Supreme Court's reversal of appellant's conviction on grounds of faulty indictment for failure to state the "question under inquiry" (369 U.S. 749), appellant has again been convicted under 2 U.S.C. 192 for refusing to answer those same two questions and sentenced to six-months' imprisonment. At the trial it was disclosed that a supposed anonymous letter never disclosed but relied on as "probable cause" by the prosecution at the first trial, had since been "destroyed" and its existence had in fact never even been known to the Committee or its Chairman. Moreover, at the new trial the prosecution sought to prove, contrary to its bill of particulars at the first trial, that there was a narrower "question under inquiry" before the Committee than that specified in its authorizing resolution. Appellant's conviction was premised by the court below on the theory that any citizen may be called from an area of public life by a committee investigating Communist infiltration, and asked "Are you a Communist?", though the Committee has no grounds to suspect the witness to be one or that he has any information on the general subject. The context from which this ruling arises in the present case, provides an object lesson in the arbitrary employment of compulsory process:

The Committee's New York Times Hearings of 1955-56

The Committee hearings from which this case arises were held prior to the Supreme Court's 1957 decision in *Watkins v. United States*, 354 U.S. 178, at a time when the Committee believed itself free to roam at random with compulsory process in any area where it chose to focus public attention on Communism or Communists. Under that broadly ranging concept of inquiry, hearings would be scheduled without any more defined question to be inquired into than the general subject of Communist membership and activity.

It was in this context that the Committee undertook its New York Times hearings. In June of 1955 in the course of hearings on "Strategy and Tactics of World Communism," Winston Burdett, a radio commentator, revealed that he had been a Communist Party member in the late 1930s and early 1940s while employed by the Brooklyn Eagle, and had then engaged in Communist activities at home and abroad. He named a number of persons as former Communists on the Brooklyn Eagle and in the Newspaper Guild; those he named were then called and questioned by the Committee.²

Later in 1955, a new series of hearings was instituted with the New York Times its apparent target. In December 1955, thirty-eight witnesses (30 of them from the Times) were questioned in an executive session in New York City (J.A. 141; R. 145-147). On January 4, 1956, the Committee commenced a public hearing which, although described by its Chairman as a "subsequent chapter to the Burdett testimony" (J.A. 71), was principally directed at the New York Times or its employees; of the eighteen witnesses

² See Parts 14, 15 & 16, Hearings before the Senate Internal Security Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 1st Session.

called in the hearing, fifteen were persons employed, formerly employed, or otherwise connected with the Times (J.A. 142-144). See Part 17, Hearings before the Senate Internal Security Subcommittee, "Strategy and Tactics of World Communism" 84th Congress, 1st Session; Prosecution Exhibit 8.

How these Times hearings were initiated, remains a mystery even after two trials and an appeal all the way to the Supreme Court. When the press inquired in November of 1955 about the issuance of the Times subpoenas, Chairman Eastland said he knew nothing about them. As James Reston wrote on January 6, 1956 (J.A. 200), "When more than fifty subpoenas were issued to people in the press, radio and other fields of communication on behalf of the Committee last November, Mr. Sourwine was the only person who seemed to know anything about them. They were issued under the name of Senator Eastland, but when this reporter called the Senator about them, he said he did not know they had been issued, did not know the hearings had been called, and said he would have to call Mr. Sourwine to find out the facts." Committee Counsel Sourwine testified in 1957 (R. 140) that there was never "in terms a committee approval, a subcommittee resolution approving the inauguration of the hearings" and he reaffirmed this in his 1963 testimony (J.A. 106-108).

On the other hand, Senator Eastland now testifies that before any hearings were scheduled, it was his unvarying custom to obtain prior Committee approval by informal conversations among Committee members on the Senate floor, in the cloakroom, or otherwise (J.A. 187-196). While Senator Eastland could "remember nothing" about any meeting prior to the New York Times hearings (J.A. 196) nor indeed did he have any recollection of anything concerning the hearings (J.A. 217), nevertheless he is con-

fidest that the late Senator Hennings was in error when at the hearing in January 1956, he stated that the Committee had not met prior to the hearing to define its scope (J.A. 72).

Apparently the Times hearings were initiated simply by the preparation of a list of witnesses by Counsel Sourwine. Prior to the executive sessions of December 1955, Sourwine obtained the signature of Senator Eastland on a number of subpoenas addressed to New York Times employees and others whose names appeared on a list he had prepared (J.A. 35-37). In obtaining the Chairman's issuance of these subpoenas, as well as the recall of a number of these same persons at the open hearing of January 1956, Sourwine gave no particulars to the Chairman about the witnesses or their testimony (J.A. 121) and expressly affirmed at the trial that "we did not discuss Mr. Shelton" (J.A. 36). Sourwine admits that he gave the Chairman only "the conclusions I had arrived at . . . I was not giving him information to support those conclusions" (R. 32). The Chairman was informed that the witnesses on the list would be valuable to the Committee in some sense, but the substance, the area, and the nature of their potential testimony was not communicated at any time to the Chairman or the Committee prior to the hearing (J.A. 121). The staff rather than the Committee itself, was in control of these matters—as Senator Hennings stated at the January open hearing, "we have no list of prospective witnesses, nor has any offer of proof as to what their testimony is likely to be been given to this subcommittee . . ." (J.A. 66). The evidence is clear that while Senator Eastland signed the subpoenas, the discretion and the power to choose witnesses for compulsory attendance at the Times hearings was wholly in the hands of staff member Sourwine. It was he who included on the list of witnesses from the

Times the name of newsman Willard Shelton,³ for reasons which to this day remain totally unexplained.

Appellant's Compulsory Attendance and Testimony

On November 16, 1955, a Committee aide arrived at the Times with approximately thirty subpoenas to Times and other press employees (R. 121). While none of the subpoenas was addressed to appellant, one of them was made out to "Willard Shelton," a nationally known columnist. On discovering that Willard Shelton was not employed by the Times, the Committee aide made inquiry and was informed that there were "several" Sheltons working at the Times, including appellant, Robert Shelton, employed on the "news side" (R. 119-24; 127-29). Subsequently, the Committee employee, after checking with Counsel Sourwine who told him it was "obvious" Robert Shelton was the man we want (J.A. 156), wrote in the words "or Robert Shelton" on the subpoena and served it on appellant (J.A. 38-39, 155). A new subpoena in appellant's name alone was issued on November 23, 1955, and served upon him (J.A. 41).

On December 7, 1955, appellant appeared pursuant to the subpoena at an executive session of the Committee in New York. He inquired why he had been called, and was twice told that the Committee was clearing up a question of identity (J.A. 46; 50-51). Interrogated on a number of subjects, he answered some of the questions, but then refused to answer others (see J.A. 45-58). When appellant first indicated that he would refuse to answer questions relating to possible Communist associations or activities,

³ The trial judge's statement that Senator Eastland "authorized the issuance of the subpoena from lists of persons, one of whom was the defendant . . ." (J.A. 236), is plain error. It is conceded on all sides that appellant's name never appeared on any list of persons to be subpoenaed.

Counsel Sourwine said (J.A. 50-51): “. . . We came into this as I explained to the Senators and to put on the record to clear up a question of identity. The record will show that the witness was not charged with being a communist.”

Together with other Times employees, appellant was recalled under the earlier subpoena (R. 66, 96) at the January 1956 public hearing of the Committee in Washington. Prior to being sworn, appellant made objection to the jurisdiction of the Committee. He pointed out that “my testimony in executive session makes it clear that the Committee will obtain no information from me that could possibly assist it in any legislative purpose,” and he objected that: “I fail to see why I am involved in this hearing which the Chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony nor in the testimony of Mr. Clayton Knowles” (J.A. 73-74). Thereupon, without explanation and upon nothing more than Sourwine’s assertion that appellant’s objection was “absurd,” the Chairman overruled his objection, and appellant was sworn and interrogated (J.A. 74). When asked whether he was a member of the Communist Party, appellant once more, but equally without avail, objected that there was no reason for his interrogation since he had been subpoenaed as a “victim of accident” (J.A. 79):

“I am involved in these hearings as a victim of accident. The subpoena first served to me was originally made out in the name of a person who does not work on my paper. A committee aide, when told that there was no such person on the Times, insisted on knowing if there was anyone with a similar name employed there. There were a few, but the only one that interested your man was the sole similar name in the news department—mine. At the executive hearings the committee counsel tried without success to link

me with a certain New York newspaper. He was unable to establish any connection because I never worked for the paper under discussion. Yet I have been called back here today."

When his objections were again overruled, appellant answered a number of questions, but refused to answer questions inquiring into possible Communist associations and conversations with other persons, on the grounds that he had been subpoenaed as a "victim of accident" and that the questioning was beyond the Committee's jurisdiction and violated his First Amendment rights (J.A. 73-88).

Sourwine Rationalization of Appellant's Subjection to Compulsory Committee Process.

Appellant's two trials for contempt have revolved about the effort to clarify why appellant was called by the Committee following the issuance of the Willard Shelton subpoena. At the Committee's December 1955 executive session, Counsel Sourwine had stated that Shelton had been called "to clear up a question of identity," and expressed great surprise at appellant's reluctance to answer questions about Communism, stating that "the record will show that the witness was not charged with being a Communist" (J.A. 50-51).⁴ At appellant's first trial a year later, Sourwine presented a contrary theory for appellant's interroga-

⁴ "I will state, Mr. Chairman, *I am greatly surprised*. I did not expect this. We came into this as I explained to the Senators and to put on the record to clear up a question of identity. The record will show that the witness was not charged with being a Communist. Counsel said you are not a Communist and you never have been; isn't that right?

"Mr. Fraenkel. Obviously that involves——

"Mr. Sourwine. The question does of course involve the answer but I must admit to the chairman, *I am taken by surprise*.

"It may be that we shall have to question this witness more at length later." (Emphasis supplied.)

tion: that appellant *had* been charged with Communist activity or information. At that time Sourwine purported to recall having seen a communication from an anonymous informant prior to the November 1955 issuance of the Times subpoenas. Among a list of those informed upon in this alleged communication, Sourwine purported to recall that there was included the name "Shelton" (without any first name) as a Times employee who might give information to the Committee about Communist activities (R. 48-49, 98). Sourwine, however, could remember nothing else about that communication, nor any of the other names on it, and had no independent recollection of it as a separate piece of paper (R. 185-196). The persistent and strenuous efforts of the defense at the trial to force production of the alleged communication, were frustrated (R. 117, 169, 181) after Sourwine flatly refused to produce the document (R. 118, 212) although he said it was in the Committee's custody (R. 99). Since appellant had thus been denied access to the "letter" relied on by the prosecution, the trial judge quite rightly refused to place any reliance upon it; instead, he held that as a member of the New York Times, the Committee had "cause" to call appellant quite apart from any confidential communication concerning him (R. 223).

As unusual as was the rationalization for appellant's subpoena presented by Sourwine at the first trial, the explication at the new trial six years later, was even more bizarre. The Assistant United States Attorney disclosed that the so-called "letter" which Sourwine said at the time of the first trial was in the Committee Counsel's safe (R. 99), had disappeared by the time of the second trial. A few days before the second trial, when for the first time the Assistant United States Attorney asked Sourwine where the "letter" was, Sourwine revealed that he could not lo-

cate it (J.A. 128, 131). At the trial he surmised that it had been "destroyed," together with other Committee documents, when Sourwine was clearing out old Committee files in 1959 (J.A. 124-131; 136-137; 145-155). Yet this was at a time when appellant's first conviction was on appeal to this Court with Sourwine's credibility as to the existence of the alleged anonymous letter a central issue presented by appellant. Sourwine could give no explanation of how an attorney of many years' experience could cause the destruction of a "letter" whose very existence (and thus Sourwine's own credibility) was then under challenge in a Federal criminal proceeding (see J.A. 169 to 176).

In sum, the Sourwine rationalization of appellant's compulsory interrogation by the Committee, remains to this date in the following posture: Sourwine purports to recollect having seen a communication prior to November of 1955 when the Times subpoenas were issued, in which a confidential informant referred to "a Shelton" on the news side of the Times; *at no time did Sourwine communicate to any member of the Committee, including the Chairman, the content or even the existence of the alleged letter referring to "a Shelton"* (J.A. 132); by some unexplained "mistake" a subpoena was issued to newsman Willard Shelton (later changed to Robert Shelton); at the hearing Counsel Sourwine exhibited "surprise" wholly inconsistent with the existence of any communication about a Shelton on the news side of the Times and his alleged statement to the process-server that it was "obvious" Robert Shelton was the man we want; appellant was interrogated in executive and open hearings over his objection that he was a victim of accident; no member of the United States Attorney's office ever saw the letter before its "destruction" by Sourwine in 1959 (J.A. 128, 150) at the very time that appellant's conviction was here on appeal, with

the principal question posed being that of probable cause for appellant's compulsory interrogation and Sourwine's credibility in connection with the alleged letter.

On these facts, the trial judge below refused to rely upon a communication of which even the Committee and its Chairman had no knowledge, finding that "*the calling of the defendant was not predicated upon the existence of the letter*" (J.A. 233). He ruled that if the Committee had to have reason or probable cause for interrogating appellant by compulsory process—which theory he wholly rejected—adequate grounds arose from the fact that appellant was a New York Times employee, since the Committee had information of possible Communist activities on the press (J.A. 233). This rationalization was adopted below in the face of testimony by Counsel Sourwine that the Committee only called Times witnesses whom it had reason to believe possessed of relevant information (J.A. 136) and that appellant would not have been called merely because he was a Times employee (J.A. 132, 135-6, 154).

The "Question Under Inquiry"

As difficult as has been the task of unravelling the occasion and purported justification for appellant's interrogation, equally troublesome has been the determination of the "question under inquiry" pursued by the Committee at that time. From the moment that appellant first came in contact with the Committee—when it served upon him an unexplained and bifurcated subpoena for the appearance of "Willard Shelton or Robert Shelton"—there was bound to be confusion concerning the subject of inquiry upon which the Committee sought his testimony. This doubt was repeatedly reflected at the executive hearing in December 1955 where appellant objected that "*the actual basis for the inquiry has not been stated to me nor does it ap-*

pear on the subpoena" (J.A. 49), and was informed by Counsel Sourwine that he had merely been called "*to clear up a question of identity*" (J.A. 46, 51). When called back in the January 1956 open hearing, appellant again voiced his doubts as to what the inquiry was about, stating "I fail to see why I am involved in this hearing which the Chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony. . . ." (J.A. 73-74).

The "question under inquiry" in the Committee's January 1956 Times hearing was, from the first, doomed to remain in doubt for, as Senator Hennings noted at the opening (J.A. 72): "the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings." The hearing accordingly covered a number of diverse and unrelated topics without ever focusing on a single subject under inquiry. This method of proceeding has been admitted and staunchly defended at the present trial by both Counsel Sourwine and Chairman Eastland. In the face of the *Watkins*' ruling, these witnesses continue their affirmation of the Committee's right to roam unrestrainedly in various areas of its interest whenever any particular witness is before it (see J.A. 111-118, 219-220).⁵

⁵ As stated by Sourwine (J.A. 113-114):

"... Every time the committee sits, it sits with its full authority. It could not divest itself of that authority by its own act. It could by its own act limit itself, or limit its actions within the scope of that authority. But in the absence of such an action by the committee to so limit its own action, whenever the committee sits, it must have in mind the range of what is charged by the Senate with an attempt to find out, trying to find out which is among other things, activities against the Internal Security of the United States, including but not limited to subversion, espionage and so on.

"Now, if we had a witness before us who was called because the committee at the time we called him thought that he had information about the activities of the person 'X' and in the course of his exam-

But the ultimate complication of the "question under inquiry" issue arises from the prosecution's bill of particulars on that question at the first trial, which it repudiated six years later in the present proceedings. In December of 1956 prior to the first trial, appellant moved to quash the indictment because it failed to advise him of the "question under inquiry," an essential element of the crime under 2 U.S.C. 192 (R. 9). Judge Holtzoff denied that motion (R. 19), whereupon counsel asked for a bill of particulars on "the nature of the question under inquiry before said committee" upon which the Government was relying under the indictment (R. 16, 19). Thereupon the prosecution stated in open court that the Committee had proceeded on its general authorizing resolution and "*it is not the case that there was any smaller, more limited inquiry being conducted*" (R. 20):

"As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted."

Appellant, of course, relied upon the Government's bill of particulars. The stipulation that there was no "smaller, more limited inquiry being conducted" than the question of Communist activity generally, confirmed appellant's argument at the first trial (which his counsel was then making before the Supreme Court in *Watkins*) that Constitu-

ination the committee had an idea that he might be able to give information about his own activities in the Communist Party or about Communist activities in another area, I would think it would be not only the right but the duty of the committee to ask that question, so that in that sense, the whole scope of the committee's responsibility is always under inquiry every time they sit unless the committee, itself, has limited a particular hearing to a narrower field."

tional and statutory limits were exceeded by the breadth of the Congressional inquiry (see R. 199-201). Following the bill of particulars given by the prosecution in 1956, the Supreme Court decided in *Watkins* that so general a question under inquiry as Communist activities cannot serve as a predicate of a contempt citation. In the face of that ruling, the Government could not successfully proceed at a second trial on its earlier representation that there was no "smaller, more limited inquiry being conducted" than the Committee's broad authorizing resolution. Accordingly, the new indictment, which the Supreme Court on the first appeal of this case required to set forth the "question under inquiry" (369 U.S. 749), stipulated that "Communist activities in news media" was the delimited question at the time of appellant's Committee appearance (J.A. 1).

The strenuous efforts of appellant at the trial below to estop the prosecution from impugning and reversing its earlier bill of particulars were of no avail; the trial judge refused to bar the Government from reversing its earlier position on the question under inquiry (J.A. 244-245). The Court so ruled in the face of appellant's contention that he was materially prejudiced by the belated reversal of the Government's position. Prior to the prosecution's shift, Senator Hennings (who chaired the executive session at which appellant appeared in December of 1955) had died, and thus could no longer be called by the defense in relation to the Government's revised theory at the new trial. And the only witness remaining available to appellant—Senator James Eastland—when called to the stand, could remember nothing about the New York Times hearings, nothing about the appellant or his testimony, and nothing about the initiation of the Times hearings (see J.A. 180-220). Of the eighteen witnesses, Clayton Knowles was the only witness whom Eastland recalled as having testified

(J.A. 205). At the trial below, Eastland was still of the view that Willard Shelton rather than Robert Shelton had testified (J.A. 198-199).

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Following the Supreme Court's dismissal of the first indictment, appellant has again been convicted and sentenced to six months in jail for refusing to answer two questions put to him in January of 1956 (J.A. 225). Appellant urges five major grounds for reversal of his conviction. But in addition to the overwhelming strength of each of those grounds, a fundamental judicial question is posed by the present case: whether rudimentary procedural protections must attend compulsory committee process when Congress calls upon the Federal courts to convict of criminal contempt those who have refused to answer a committee's inquiries. We urge that upon the record before this Court, there is no possibility of an affirmance unless federal courts must convict of contempt those who justifiably plead that they have been the victims of haphazard and arbitrary process at the whim of Congressional staff members.

Statutes and Constitutional Provisions Involved

2 U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

"Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any ques-

tion pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Congress, 2d Session, provides in part:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"RESOLVED, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration,

operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement of Points

The District Court erred:

1. In convicting appellant whose Fourth Amendment and Fifth Amendment due process rights were violated by the Committee's failure to have, as well as its refusal at the hearing to disclose, reasonable grounds for appellant's compulsory interrogation;
2. In permitting the prosecution to reverse its position on the "question under inquiry" stipulated by a bill of particulars at the first trial, although the accused's right to fair rebuttal was prejudiced since meanwhile witnesses had died and recollections had faded;
3. In convicting appellant in the absence of a delimited "question under inquiry" at the time of his Committee appearance;
4. In convicting appellant though the Committee interrogation violated his First Amendment rights;
5. In refusing to acquit the appellant though his rights under Committee and Senate rules were violated in the hearings.

Summary of Argument

1. *Appellant's rights under the Fourth Amendment and the due process guarantee of the Fifth Amendment were violated by the Committee's failure to have, as well as its*

refusal at the time of the hearing to disclose, reasonable grounds for appellant's compulsory interrogation. The Government and the court below take the view that a Congressional committee requires no probable cause or reasonable belief that a witness has pertinent testimony to give, before it subjects him to compulsory interrogation. But precedents from *Boyd* (116 U.S. 616) and *Brimson* (154 U.S. 447) to *Watkins* (354 U.S. 178), *Barenblatt* (360 U.S. 109) and *Wilkinson* (365 U.S. 399), demonstrate that Congressional committees must have reason to believe a witness knowledgeable on the subject of inquiry before compelling him to testify.

Here there was no probable cause or reasonable belief for appellant's compulsory interrogation. The supposed anonymous letter "destroyed" during the first appeal of this case, whose existence was never indicated to the Committee or its Chairman, was properly rejected by the court below, which found that "the calling of the defendant was not predicated upon the existence of the letter, as the Senator, who had authorized the issuance of the subpoena, testified that he had no knowledge of such a letter until this trial." The rationalization of probable cause by the lower court—that as an employee of the New York Times appellant could be called merely because the Committee had information of Communist activity in news media—cannot stand. Such a rule would be the essence of arbitrary and dragnet process. Moreover, even the Committee itself rejects such a theory of subpoena power, for its counsel testified that "I didn't ask the Committee to authorize the subpoenaing of anyone on the basis of that theory."

Apart from the failure of the Committee to have cause for appellant's interrogation, appellant was also denied fair opportunity to judge whether the Committee had adequate basis for questioning him, when it refused to tell him

why he was called to testify. Like the witness in *Watkins v. United States*, 354 U.S. 178, appellant was entitled to a response by the Committee to his "victim of accident" objection, so that he could seasonably make an informed judgment whether the Committee had grounds for requiring him to answer its questions.

2. *The prosecution's reversal of position on the "question under inquiry," six years after the first trial when witnesses had died and recollections faded, prejudiced the accused's right to fair rebuttal.* By an oral bill of particulars prior to the first trial the United States stipulated concerning the question under inquiry, that "we do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted" than the general subject of Communist activity specified in S. Res. 366. Six years later, after the Supreme Court's decision in *Watkins* rendered such a question too broad to support a contempt conviction, the Government did an about face; in the new indictment and trial, it alleged that there *was* a delimited inquiry before the Committee, into "Communist activities in news media", at the time of appellant's appearance.

The leading Supreme Court case in this area (*Davis v. Wakelee*, 156 U.S. 680), sets forth the general rule of estoppel against inconsistent positions in judicial proceedings. That rule is doubly applicable in federal criminal cases, where the prosecution is held to a high standard of fairness, never lower than that applicable to private litigants.

Moreover, although reliance and prejudice are not elements of this form of estoppel, both existed here. At the first trial, relying on the bill of particulars, appellant produced no rebuttal testimony against the stipulated "question under inquiry"—by the time of the second trial appellant was precluded from a fair rebuttal on the Government's "question under inquiry." Senator Hennings (who had

intimated at the hearings that no delimited question of inquiry had been determined upon by the Committee) could no longer be called at the second trial, since he was deceased. And the only remaining defense witness, Senator Eastland, purported to have no recollection on the critical "question under inquiry" issues. Fifty-four times he pleaded failure of memory—on everything concerning the 1956 New York Times hearings, including the witnesses called and the particulars of any Committee meeting approving or defining the Times hearings. Appellant's right to rebuttal was thus prejudiced by the belated reversal of the Government's position on the "question under inquiry."

3. *Contrary to constitutional due process and statutory requirements, there was no delimited "question under inquiry" before the Committee at the time of appellant's appearance.* The vacillation by the Committee, the prosecution, and the testimony of its witnesses, precludes as a matter of law any finding that a question under inquiry was proved beyond a reasonable doubt. See *Deutch v. United States*, 367 U.S. 456. The prosecution in its earlier bill of particulars was of the view, which Committee Counsel Sourwine continued to affirm at the trial below, that there was no delimited inquiry before the Committee into any subject narrower than the general Communist activities defined by S. Res. 366. Other evidence from prosecution witnesses and the Committee indicated that among the subjects under investigation at the hearing were those dealing with Communism in the New York area, in the Typographical Union, and on the New York Times. On this record, it cannot be found either that the appellant was clearly aware at the time of the hearing or that the Government proved beyond a reasonable doubt at the trial, what Assistant United States Attorney Hitz and Committee Counsel Sourwine have denied—that there was a delimited question under inquiry

before the Committee narrower than its general authorizing resolution.

4. *Appellant's interrogation at the 1956 New York Times hearings of the Internal Security Subcommittee violated his freedom of speech, press, and association.* The Committee's inquiry seriously repressed and discouraged the freedom of the press to employ persons holding unpopular, unusual or minority views. In the absence of a showing of actual and compelling legislative need for such burdensome and unprecedented invasion of freedom of speech, press and association, appellant cannot be convicted for refusing to submit to the Committee's demands for disclosure. *Watkins v. United States*, 354 U.S. 178.

5. *Senate and Committee rules were violated in the New York Times hearings.* S. Res. 366 provides that the Committee may subpoena such witnesses "as it deems advisable", and Rule No. 1 of the Committee provides that "No major investigation shall be initiated without approval of the majority of the Subcommittee." Senator Hennings stated at the hearings and Counsel Sourwine testified at the trial, that the Committee never even met to authorize the New York Times hearings. Chairman Eastland's belief that there must have been such an authorizing meeting is unsupported by any actual recollections concerning such a meeting and is contradicted by his earlier testimony.

Moreover, it is uncontested that Committee Counsel Sourwine had controlling discretion in the selection of witnesses to be subpoenaed for the Times hearings. In getting Senator Eastland's approval of the subpoenas he did not give the Senator individual reasons for calling particular witnesses. Under these circumstances even if Chairman Eastland was authorized to select witnesses to be subpoenaed (and S. Res. 366 actually vests that discretion in the Committee, not its Chairman), here Sourwine was in sole con-

trol of the witness list, in clear violation of S. Res. 366. On account of these rules violations appellant must be acquitted. *Yellin v. United States*, 31 L.W. 4727.

ARGUMENT

I

Appellant's Rights Under the Fourth Amendment and the Due Process Guarantee of the Fifth Amendment were Violated by the Committee's Failure to have, as well as its Refusal at the time of the Hearing to Disclose, Reasonable Grounds for Appellant's Compulsory Interrogation.

From the time that appellant first appeared before the Committee and objected that as a "victim of accident" the Committee had no cause to question him and that he failed to understand why he was being subjected to interrogation, the Committee and the prosecution have steadfastly taken the position that no reason or probable cause is required for compulsory interrogation of a citizen by a Congressional committee. The court below found that there is "complete lack of authority for defendant's contention that a committee of Congress must have 'probable cause' to call a witness to testify before it" (J.A. 233).⁶ But as the authorities make clear, there is no exemption for Congress from the requirements of the Fourth Amendment and the due process guarantee of the Fifth Amendment, affording safeguards in the application of compulsory process to the citizen.

⁶ At the first trial, the unlimited theory of Congressional process was espoused by the prosecution in its "man off the street" theory. The prosecution announced that: "a man on the street could be called off the street and asked, 'Are you one of the persons that we have a duty to protect this country from?'" (R. 40). While the court below was not induced to go this far, it adopted a principle of "no judicial review" which in effect leaves Congressional committees free to call the man off the street.

Supreme Court rulings require that compulsory Congressional Committee interrogation proceed only in the presence of probable cause for belief that a witness has relevant information to impart to the Committee. Following our discussion of the authorities (*infra*, pp. 25 to 30), we show first that no reasonable cause existed for appellant's compulsory interrogation (*infra*, pp. 30 to 34), and second that in any event the principle of *Watkins* was violated by the refusal of the Committee to make any explanation to appellant at the time he objected that he had been subpoenaed as a "victim of accident" (*infra*, pp. 34 to 36).

A. *Authoritative Supreme Court Rulings Preclude Compulsory Congressional Inquiry Lacking in Cause to Believe a Witness Possessed of Pertinent Information.*

Nothing in the history of the Fourth Amendment, in its text, or its underlying purpose, warrants an exemption for the Congress. No more may a Congressional committee search a man's mind without probable cause than a constable may search his pockets.

Ever since *Boyd v. United States*, 116 U.S. 616, compulsory Governmental process has been held to be subject to Fourth and Fifth Amendment limitations, whether issued by a court (as in *Boyd*), a grand jury (*Hale v. Henkle*, 201 U.S. 43), a regulatory agency (*Interstate Commerce Comm. v. Brimson*, 154 U.S. 447), or the Executive (*Okla. Press Pub. C. v. Walling*, 327 U.S. 186). And the Supreme Court has repeatedly made clear in its adjudication of Congressional contempt cases, that just like other Governmental departments, Congress may not make unreasonable or arbitrary use of process.

As early as *Sinclair v. United States*, 279 U.S. 263, 292, in a thorough analysis of the Congressional investigatory power, the Supreme Court reviewed its interdictions of "fishing-expedition" abuse, and declared:

"It has always been recognized in this country, and it is well to remember that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures. . . ."

In *Watkins v. United States* 354 U.S. 178, 188, the Supreme Court emphasized that,

"The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure."

Again, in upholding the conviction in *Barenblatt v. United States*, 360 U.S. 109, 134, the Court noted that Barenblatt's interrogation did not involve "*indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee.*" And again, in *Wilkinson v. United States*, 365 U.S. 399, 412, the Court warned that:

"It is to be emphasized that the petitioner was not summoned to appear as a result of indiscriminate dragnet procedure, lacking probable cause for belief that he possessed information which might be helpful to the subcommittee . . . the subcommittee had reason to believe at the time it summoned the petitioner that he was an active Communist leader. . . ."

Finally, in *Gibson v. Florida Legislative Investigation Committee*, 83 S.Ct. U.S. 889, 899, the Court held that "an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights".

The Supreme Court's continuing insistence upon the applicability to Congress of constitutional guarantees against arbitrary or dragnet inquisition, reflects the Court's awareness of the central significance attaching in our democratic form of government to individual privacy, free from all forms of unjustified Governmental intrusion by force or by compulsion of law. Perhaps the classic summary of this "first principle" is that by Mr. Justice Brandeis, dissenting, in *Olmstead v. United States*, 277 U.S. 438, 478:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.*" (Emphasis supplied).

In *Olmstead*, Justice Brandeis echoed the Supreme Court's earlier formulation in *Interstate Commerce Comm. v. Brimson*, 154 U.S. 447, 478-479, summarizing constitutional limitations which "*for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress:*"

"In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

"We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possess, or can be invested with a general power of making inquiry into the private affairs of the citizen. *Kilbourn v. Thompson*, 103 U.S. 168. We said in *Boyd v. United States*, 116 U.S. 616, 630—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 250, 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.' "

Finally, as the Supreme Court has many times emphasized, the guiding formulation in adjudications under the Fourth and Fifth Amendments (which "run almost into each other"), is provided by its landmark decision in *Boyd v. United States*, 116 U.S. 616, 630. There, in striking down Congressional legislation intruding upon Fourth Amendment protections, the Court warned that:

"The principles laid down in this opinion [*Entick v. Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment."

We submit that the line of precedents running from *Boyd* and *Brimson* to *Watkins*, *Barenblatt*, and *Wilkinson*, makes clear that Congressional committees may not, absent reason to believe that a witness has pertinent information to give, forcibly subject him to compulsory interrogation. And if

that view of the Constitution and the authorities be correct, it follows that the conviction below must be reversed for two separate and independent reasons: First, because there was no color of probable cause or reasonable belief as the basis for appellant's interrogation by the Committee, and second, because in violation of the due process guarantee, appellant was denied fair opportunity to judge whether the Committee had a basis for questioning him, when it refused to answer his inquiry as to why he had been selected for interrogation.

B. There Was No Probable Cause or Reasonable Belief For Appellant's Compulsory Interrogation.

It is perfectly clear from the record before this Court that the Committee had nothing even faintly approaching probable cause or reason to believe that appellant had any information concerning Communism.⁷ That such cause or reason to believe might have been supplied by an alleged anonymous communication which was never produced at the first trial, which had disappeared by the time of the

⁷ Possibly this Court need go no further inquiring into the "probable cause" issue than to note that on this record the Chairman of the Committee who actually issued the subpoenas, did so simply on the request of Committee Counsel without being informed of anything at all about the witnesses other than the "conclusion" of Counsel Sourwine that the witnesses should be called. See J.A. 37, 121, 133. It is clear from analogous areas of compulsory process that the cause for process must be made explicit to the authorizing officer to conform with Fourth Amendment requirements. See *Wong Sun v. United States*, 371 U.S. 471, 481-82; *Nathanson v. United States*, 290 U.S. 41. Since Counsel Sourwine has testified that he never discussed with Chairman Eastland either the alleged anonymous letter referring to a Shelton on the Times or a general principle of inquiry among members of the Times or working press (J.A. 133), the only "probable cause" ever suggested in these proceedings was never made known to the Committee or its Chairman. This Court need go no further than the fact that since no predicate for the New York Times subpoenas was ever provided by Counsel Sourwine to Chairman Eastland, there was no proper process consistent with the Fourth Amendment to support citations for contempt.

second trial and which was wholly unknown to the members of the Committee including the Chairman, was rejected by the Court below. The Court refused to rely upon any such communication, stating (J.A. 233):

"it is clear to the Court, from the testimony of Senator Eastland that the calling of the defendant was not predicated upon the existence of the letter, as the Senator, who had authorized the issuance of the subpoena, testified that he had no knowledge of such a letter until this trial."

However, the Court, although holding that there was no need for probable cause, purported to find it in the fact that "*defendant was a working member of the press at the time he was called to testify, and was employed on the same newspaper as several other witnesses called by the Subcommittee, which at that time unquestionably had information which indicated communist activity in attempting to infiltrate news media*" (J.A. 233). The District Judge quotes the observation of a panel of this Court on the previous appeal (J.A. 234), to the effect that it was "not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees."⁸

⁸ We do not believe that this brief comment in the panel decision went as far as the District Court assumes. The salient difference in this respect between the former and the present record is that it has now been revealed and found by the court below that the Committee and its Chairman never knew anything about a "letter" mentioning a Shelton on the Times. Thus, the *only* basis for calling appellant would now have to be the fact that he was one of thousands of Times employees. We are sure that the panel decision of this Court would not have gone this far, validating a dragnet principle of Congressional subpoena power to call witnesses and question their loyalty, simply because they are members of the working press. In any event, it should be noted that even on the prior record the question whether probable cause existed for appellant's interrogation by the Committee, was found worthy of the grant of certiorari by the Supreme Court.

On the present record the calling of appellant by the Committee has been found not to have been predicated on any "letter" from which the Committee might have believed appellant knowledgeable about Communism in news media. Therefore, it does in fact become dragnet process to call him merely as one of the 30,000 members of the working press or 5,700 members of the New York Times, on the chance that he might have information about Communist activities. Certainly, if the authorities have information that a handful of Times employees have committed a theft or are engaged in a numbers operation, they would have no basis for arresting and searching 5,700 Times employees or picking at random members to be searched. No more may a Congressional committee roam around among thousands of press employees with the question: "Are you, sir, a member of the Communist Party U.S.A.?" on the chance that an affirmative answer might be forthcoming. Such a principle of "probable cause" would leave no citizen of the United States free from compulsory interrogation, for in every walk of life Congressional committees have some evidence that a few persons have engaged in Communist activity. In short, the rationalization by the trial court of the "probable cause" for calling appellant, would validate the very essence of arbitrary and dragnet process.

Moreover, another definitive answer to the lower court's rationalization is that the principle of probable cause espoused by the Court had been rejected by the Committee itself. Certainly, if a Committee fails to have a reasonable basis for interrogating a citizen, it will not do for the courts to suggest a hypothetical basis which the Committee itself denies. Thus, Committee Counsel Sourwine who had told appellant at the executive hearing that he had been called to resolve a "question of identity," rejected the idea that the Committee would have called appellant because he was

a member of the Times or the working press. Sourwine stated "*I didn't ask the committee to authorize the subpoenaing of anyone on the basis of that theory*" (J.A. 132),⁹ and that "*we would not have sought to secure the testimony of . . . Shelton*", *merely as a Times employee* (J.A. 154).¹⁰ And, of course, Sourwine never suggested to Senator Eastland subpoenaing appellant on this theory (J.A. 133).

Since the Committee itself did not employ the expansive theory of subpoena power suggested by the court below, that theory cannot suffice to validate appellant's compulsory interrogation. We do not believe that a District Court can

⁹ "Q. Mr. Sourwine, at the last trial you testified, I believe—correct me if you think I am wrong—that the only basis of subpoenaing Mr. Shelton was this letter now destroyed?"

"A. I don't think that is entirely accurate. I do remember that I testified that the only information we had specifically about Mr. Shelton had come in this letter. I think we had other basis for calling Mr. Shelton . . .

"Q. Now since you didn't have other specific information, what was your basis for calling him; the other one?"

"A. The fact he was employed on the Editorial side of the New York Times and we had evidence respecting Communist infiltration on that side. I think we could have called anyone on the editorial side of the New York Times and asked them whether they had any knowledge of it.

"Q. Did the committee authorize you to subpoena anyone else from the Times on the theory you have just stated?"

"A. I didn't ask the committee to authorize the subpoenaing of anyone on the basis of that theory. We didn't have time to go at it that way, Mr. Rauh. I was trying to recommend to the committee only people that I thought might be in a position to give us useful information . . ."

¹⁰ "A. . . . the only information that we had at the time the subpoena was issued, the subpoena which erroneously and through error carried the Willard—that's the first name—was information obtained from the so-called pseudonym letter in the area of Mr. Shelton's connection with a Communist group on the New York Times, but I think I have also testified that there was other basis for calling. Now, I'm not trying to withhold the facts from you, and I will be perfectly willing to concede here that he probably would not have been called; that is, we would not have sought to secure the testimony of the Shelton who worked on the news side of the New York Times if we have not received information from this informant that there was such a Shelton and that he was connected with a Communist group on the Times and should be able to give us information. Now that is the state of the facts."

validate the Congressional process being vindicated by prosecution for contempt upon a *different ground* from that under which the Committee actually issued its process and sought to enforce it. While no precisely applicable case has been found, the validation of Congressional process on a theory never pursued by the Committee is at odds with two lines of Supreme Court adjudications represented by *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80, and *Service v. Dulles*, 354 U.S. 363. These authorities and the cases which follow them stand against the judicial validation of the action of a coordinate branch of the Government on a theory different from that actually pursued by the coordinate branch. Judicial substitution seems equally impermissible when the courts are asked to enforce Congressional process by use of a theory under which Congress has not yet issued its process. See also *Giordenello v. United States*, 357 U.S. 480.¹¹

C. In Violation of the Due Process Guarantee of the Fifth Amendment, Appellant Was Denied Fair Opportunity to Judge Whether the Committee Had Adequate Basis for Questioning Him When It Refused to Reveal Why He Was Called to Testify.

Apart from the failure of the Committee to have any palpable cause for appellant's interrogation, a substantial question is also presented by the Committee's failure to answer appellant's inquiry as to why he was called. Ap-

¹¹ A weighty due process question is also presented by the attempted validation of appellant's interrogation at the January hearing on the "man off the press" rationale. To the extent that any information had been given appellant by the Committee, it was the revelation at the December hearing that he had been called to clear up a "question of identity." A due process violation would inhere in a conviction predicated on a different theory, for appellant would then have been affirmatively misled by what the Committee did tell him. Cf. *Raley v. Ohio*, 360 U.S. 423.

pellant pointed out that Winston Burdett, whose testimony was mentioned by the Chairman at the opening of the hearings, had made no reference to appellant (J.A. 73-74) and pleaded that he had been called as a "victim of accident" (J.A. 79). Appellant's objection to being sworn and having to testify although the Committee had no basis for believing him possessed of relevant information, was not answered in any way by the Committee. Instead, his objection was summarily brushed aside, and he was sworn and interrogated. But under the principle of the Supreme Court's decision in *Watkins v. United States*, 354 U.S. 178, it was a violation of appellant's Fifth Amendment right to due process for the Committee to withhold from him, notwithstanding his specific inquiry, information necessary for him to judge whether in fact he was required to answer the questions put to him.

Appellant's objection was that the Committee had no reasonable cause for calling him, that in fact he was a victim of accident. If in fact there was no probable cause or reason for his interrogation, appellant was not required to answer the Committee's questions. If, on the other hand, the Committee had some reason or basis to subject appellant to compulsory interrogation, he was entitled to be seasonably informed of that reason so as to be able to make an informed decision whether the Committee had adequate grounds to subject him to compulsory disclosures. That is the ruling in *Watkins*. And, while the subject of doubt in the mind of *Watkins* was as to the "question under inquiry" and the pertinence of the information sought from him, whereas here the doubt concerned the probable cause or reason for singling out Robert Shelton as a witness, the principle applies equally in both cases.

Nor is it any answer to suggest, as does the court below, that notwithstanding the Committee's refusal to answer

appellant's objection "he was fully aware of why he was called," because he indicated his belief that he was to be questioned about Communism in the newspaper field (J.A. 235). Appellant may have known from colleagues on the Times what he was to be questioned *about* (though at the earlier executive session he had in fact been told that the Committee was merely clearing up a "question of identity"), but appellant did not know why *he* was being called to testify in the area of the Committee's inquiry. That was the thrust of his objection that he was a "victim of accident," and that is what the Committee failed either to honor or to answer.

It thus becomes irrelevant what, if any, probable cause the Committee had for interrogating appellant. For on his specific objection and inquiry, the Committee failed to make *any* cause or reason apparent to him.¹² Like Watkins, appellant was entitled to know the theory or principle upon which the Committee presumed to require him to answer before being put to pain of contempt for refusing to answer. The transgression of that right requires appellant's acquittal.

II

The Prosecution's Reversal of Position on the "Question Under Inquiry" Six Years After the First Trial when Witnesses had Died and Recollections Faded, Prejudiced the Accused's Right to Fair Rebuttal.

In a contempt of Congress prosecution, the principal trial issue ordinarily arises from the statutory "materiality" requirement—that the questions a witness has refused to

¹² Indeed, Senator Eastland repeatedly asserted at appellant's trial that he felt no obligation whatever to tell appellant why he was not a victim of accident when he appeared before the Committee and raised this point (J.A. 206-207).

answer be pertinent to the "question under inquiry." See *Russell v. United States*, 369 U.S. at 756, 764. Appellant, prior to the first trial, moved that the indictment be dismissed because it improperly failed to set forth the question under inquiry (see R. 10, 11)—a point ultimately upheld by the Supreme Court in this very case (369 U.S. 749). The motion having been denied, appellant's counsel requested a bill of particulars (R. 16, 19) concerning the nature of the alleged "question under inquiry," pointing out that "as of now we stand helpless to know what these questions were pertinent to, what the inquiry was . . ." (R. 16). Thereupon, Assistant United States Attorney Hitz repeatedly stated, and stipulated by oral bill of particulars, that there was *no* question under inquiry more limited or restricted than the general subject of Communism. Hitz stated (R. 17) "*there is no particularly-defined inquiry less than the full authority to which this Committee was restricted at this particular hearing*" and that "For the defendant to know what particular inquiry may have been uppermost in the minds of the committee, without restricting its general authority, would be of no help because the pertinency of the question asked would be as broad as the authority which the committee had, and that is stated in the resolution itself which may be obtained . . ." Finally, Hitz provided a bill of particulars (R. 19-20) to the effect that there was no "smaller, more limited inquiry being conducted" than one into the general subject of Communism set forth in S. Res. 366:

"Mr. Hitz. I will waive written notice of the bill of particulars, if Your Honor would care to hear it orally from counsel.

"The Court. I shall be glad to hear it. Very well, I will hear your application.

"Mr. Silard. The request of the bill is for the same

information as the first point of our motion to dismiss, that is, for the specific authority under which the subcommittee was said to be conducting hearings and, secondly, for the nature of the question under inquiry before said committee.

"The Court. What do you say about that, Mr. Hitz?

"Mr. Hitz. The resolution, No. 366, provides in two places for the duties of the full committee which were authorized by this particular resolution to be carried on by any duly authorized subcommittee thereof.

"In that sense, I am supplying at this moment the authority for the subcommittee named in the indictment to carry on the purposes of the full committee contained in the resolution.

"We will prove, at a later time, the transfer of the authority contained in this particular resolution from the full committee to the subcommittee."

"As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.

"This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution.

"The Court. It seems to the Court that the Government has supplied the bill of particulars orally."

Six years after these events, by an unprecedented reversal of position in a federal criminal proceeding, the Government alleged in its new indictment and sought to

prove at the trial below that there *was* a delimited question under inquiry at the time of appellant's appearance before the Committee: "Communist activities in news media" (J.A. 1). Between the two trials, the Supreme Court had decided *Watkins* in a manner which precluded a successful new trial on the basis of the Government's earlier representations to this appellant and the Court, that there was no more limited inquiry before the Committee than Communism generally. Therefore, for its own convenience and benefit, the Government took a position in the new trial directly contrary to the position and the assurances given in open court prior to the first trial that "it is not the case that there was any smaller, more limited inquiry being conducted" than the general subject of S. Res. 366.

Appellant's efforts at the trial to estop the Government from reversing its earlier position were rebuffed by the court below, which ruled that the Government had "done no more than narrow the issues from the full resolution to the specific inquiry into communist activities in news media" (J.A. 245). But it is clear that however euphemistically the Government's change of position be described, the Government in fact diametrically reversed position. For the present indictment alleging the delimited question under inquiry of "Communist activities in news media", contradicts the earlier bill of particulars that "we do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted" than Communism generally. And that reversal of position clearly violates the principal authorities concerning the taking of inconsistent positions in judicial proceedings.

The leading case on this subject (quoted and applied by this Court in *Jamison v. Garrett*, 92 App. D.C. 232, 205 F. 2d 15) is the Supreme Court's landmark decision

in *Davis v. Wakelee*, 156 U.S. 680. The general rule was there set down by the Court (at p. 689) as follows:

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

More recent decisions applying this principle in various situations are reviewed in Beck, *Estoppel Against Inconsistent Positions in Judicial Proceedings*, 9 Brooklyn L. Rev. 245. See also 65 Harv. L. Rev., pp. 823-824; 19 Am. Jur., Estoppel, § 72 et seq. As Beck points out in reviewing the applicable cases, estoppel against change of judicial position by a party does not require a showing of prejudice (cf. 19 Am. Jur., Estoppel, § 72), but rests more directly on the consideration that parties should not be permitted to blow hot and cold before the courts simply as their convenience or benefit may change: "*The gravamen of this type of estoppel . . . is not reliance by the other party to his resultant detriment, but rather is in having deliberately taken a legal position, from which the courts will not permit one to recede, for purposes of convenience*" (9 Brooklyn L. Rev. at p. 248).

The guiding authorities on estoppel against change of judicial position are doubly applicable to a prosecution in federal court. It is intrinsic to criminal proceedings that the prosecution is charged with a standard of conduct never lower and generally higher than that to which private parties are held before the courts. As unseemly as it is for private parties to change their judicial position in mid-stream, it is doubly debasing for the Government to reduce a criminal proceeding to a mere game without rules or

honor. It seems inconceivable that federal courts charged with the administration of justice could permit the Government to impugn and reverse its representations of fact and law—made by a bill of particulars which is the most formal means by which the Government can take a binding position in a criminal case—merely because it serves the Government's convenience to attempt to prove the contrary of its earlier binding representation. Cf. *Jones v. United States*, 362 U.S. 257, 263-64; *Brady v. Maryland*, 83 S. Ct. 1194, 1197. See *Berger v. United States*, 295 U.S. 78.

While we think these considerations are dispositive and that the lower court accordingly erred in refusing to estop the prosecution, it is also clear that the defense was prejudiced by the Government's belated reversal of position. For if, instead of its misleading bill of particulars prior to the first trial, the Government had then taken the position it finally adopted below, the defense would have had fair opportunity to produce evidence rebutting the charge that the Committee was pursuing the delimited question of Communism in news media when appellant appeared. At that time, Senator Hennings, Chairman of the executive hearing at which appellant had appeared in December, was still alive. The Senator could have been a principal rebuttal witness for the defense, for he himself had complained at the January open hearing that the Committee had not even met to define any policy for the hearing (J.A. 72). Earlier, at the executive session, he had indicated to appellant's counsel the breadth of the Committee's investigation by pointing out, when appellant was testifying, that "it would seem to me rather difficult for you to determine as counsel or for this witness to determine what is relevant or what is pertinent to the subject matter of the entire inquiry" (J.A. 54). Certainly, Senator Hennings would have been of principal assistance to the defense on the Government's revised "question under inquiry" alle-

gation. And while Hennings himself had at the hearing affirmed the Committee's interest in Communism in news media, he would nevertheless have testified that the Committee, never even having met prior to the Times inquisition, had never delimited its hearing to that question or to any other question narrower than its authorizing resolution.

The Government's belated change of position on the question under inquiry, after the Supreme Court had decided the *Watkins* case and after Senator Hennings had died, denied the defense fair opportunity to produce the Senator as a rebuttal witness on that critical question. The only witness remaining available to the defense was Senator James Eastland. Although recalling nothing whatever about the hearings, he flatly contradicted Senator Hennings' statement at the open Committee hearing that the Committee had not met prior to its New York Times hearings (J.A. 192); appellant, of course, was denied any means of rebuttal.

Finally, it is clear that the limited opportunity which remained open to the defense by calling Senator Eastland to disprove the Government's revised theory of the "question under inquiry," was wholly illusory. Whether the Committee had met before the Times hearings, whether it had defined a question under inquiry for these hearings and, if so, how it had so defined it, were the critical evidentiary points relating to the Government's revised "question under inquiry." Had appellant been able to call Senator Eastland at his first trial, even this hostile witness might have given useful evidence on these subjects. But by 1963 Senator Eastland had retreated to failure of recollection on these matters. Thus, while he was sure that in accordance with general practice the Committee must have met to approve the Times hearings (J.A. 191), and stated

that Senator Hennings (J.A. 192) and counsel Sourwine (J.A. 190) were in error in stating that it had not, he had no actual recollection of a meeting and could "remember nothing about it" (J.A. 196). Who might have attended such a meeting, where it took place, and what was said, had all faded from the Senator's recollection (J.A. 191-196). Indeed, *everything* about these hearings themselves had faded from the Senator's recollection by the second trial (see J.A. 217). Of the eighteen witnesses at the open hearing, the Senator could recall only a single one (J.A. 195). He was under the misimpression that newsman Willard Shelton rather than Robert Shelton had appeared at the time (J.A. 198-199). In all, the Senator answered counsel's questions no less than 54 times with, "*I don't remember,*" or "*I can't recollect.*"¹³ On the critical questions put by the defense relating to the initiation of the Times hearings, and the delimitation of any question under inquiry at those hearings through formal or informal Committee action, Senator Eastland simply could not recall anything.

Under these circumstances, it seems clear that the belated reversal of position by the Government materially prejudiced the right of the accused to a fair rebuttal of the new charge against him. If prejudice be necessary to estop the Government from reversing its position—and we would urge under the authorities that it is not necessary—it is abundantly clear that prejudice did in fact result. The Government's altered theory of appellant's crime, advanced years after the facts, came at a time when appellant could no longer produce effective rebuttal testimony either through the Chairman of the executive hearing—

¹³ "Q. Can you name a single witness [before the Committee] who has ever said he didn't remember as often as you have said it this afternoon?
A. [Eastland] Well, I don't know . . ." (J.A. 212).

who had died—or the Chairman of the open hearing—who could remember nothing. Appellant's conviction cannot, therefore, be permitted to stand.¹⁴

III

Contrary to Constitutional Due Process and Statutory Requirements, There was no Delimited "Question Under Inquiry" Before the Committee at the Time of Appellant's Appearance.

Under the elements of the contempt statute (see *Deutch v. United States*, 367 U.S. 456) and under the Fifth Amendment as construed in *Watkins v. United States*, 354 U.S. 178, the prosecution must prove beyond a reasonable doubt, and a Congressional Committee must make clear to an objecting witness, a delimited "question under inquiry" to which the questioning of the witness is addressed. Since the Committee had never prior to the Times hearing delimited its scope to any particular area, it inevitably followed that a defined subject of inquiry could not be discerned at the hearing and could not be proven at the trial. The vacillation by the Committee, and by the prosecution and its witnesses, on the "question under in-

¹⁴ We note for the consideration of the Court that a serious statute of limitations question would be presented if it was permissible for the Government to change its position. The allegation that appellant refused to answer questions pertinent to the question of Communism generally (the first indictment as refined by the bill of particulars) is the allegation of a *different crime* from that charged in the present indictment, asserting that appellant refused to answer questions pertinent to the question of Communist activity in news media. The statute of limitations had run on a new indictment before the present indictment was filed and only the savings clause for faulty indictment, 18 U.S.C. 3288, permitted a reindictment in the next succeeding term of court. But it seems clear from the purpose and text of the savings statute, that after the normal statutory period has run, the Government may reallege in a new indictment only the *same crime* alleged in the indictment dismissed as faulty, not a different crime.

quiry," preclude as a matter of law any finding that a question under inquiry was demonstrated beyond a reasonable doubt.

The Times hearings covered a number of diverse and unrelated subjects. It has subsequently been suggested in this case (1) that there was no more limited question under inquiry than the Committee's authorizing resolution—i.e. Communism generally; (2) that the question under inquiry was Communist infiltration into news media; (3) that the question under inquiry was Communism in the New York Typographical Union or in the New York area; and (4) that the question under inquiry was Communism on the New York Times. In this case, one or more of these "questions under inquiry" were espoused by the Committee Chairman, by the prosecuting attorney and by Government witness Sourwine:

i. *Subcommittee Views.* The 1956 Times hearing was denominated by the Committee, when it printed the hearing, as "Strategy and Tactics of World Communism, Communist Activity in New York" (Gov. Exh. No. 8). Senator Eastland, however, spoke of the hearing at the opening on January 4, 1956, as one to "pursue every lead which developed out of the Burdett testimony" (J.A. 71); he said "we are not . . . investigating any newspaper or any group of newspapers" (J.A. 72).

ii. *Prosecution's Theory.* A radically different theory was expressed at the first trial in the Government bill of particulars concerning the "question under inquiry" (see R. 16, 19-20). As already noted (pp. 37 to 39, *supra*), the prosecution stated "the inquiry being conducted was pursuant to this resolution [S. Res. 366]. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted."

iii. *Sourwine Evidence.* A still different view emerged from the testimony of Government witness Sourwine at the first trial. He testified that there were four diverse questions *simultaneously* under inquiry at the time of appellant's appearance (R. 138-139)—Communism generally, Communism among newspaper people, Communism on the Times, and Communism in the Typographical Union:

"Q. . . . I refer you to 2 U.S.C. 192, the contempt statute, which says that it shall be contempt for refusing to answer any question pertinent to the question under inquiry. I ask you, what was the question under inquiry when the defendant testified?

"A. Well, there are two ways to answer that. Broadly, the question under inquiry was the scope and extent and activities of the communist conspiracy against the United States, more specifically, as it applied to the New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees.

"Q. So there are three gradations.

"A. You can make as many gradations as you want. I am attempting to answer your question.

"The committee, every time it sits, Mr. Rauh, sits with its full authority. That authority is fixed by the Senate of the United States, and neither the full committee nor the subcommittee can change it. I am trying to be responsive to your question.

"When the committee was questioning this particular witness, within the area of its much broader investigation, it was concerned with the particular area of that broader investigation which concerned communist

activity among newspaper people, communist activity on the New York Times, and communist activity in an effort to infiltrate the Typographical Union in New York.' "

At appellant's second trial, Sourwine continued to adhere to the view that there was no single question under inquiry at the Times hearing when appellant appeared. In extensive answers to questions regarding the "question under inquiry," Sourwine listed a number of different subjects of inquiry at the Times hearings (J.A. 111-114) approximating those he had described at the earlier trial. He also made clear that while these varying questions were of interest to the Committee in its investigation, the hearing was not delimited to any one or more of these questions. Rather, Sourwine indicated that he agreed with the bill of particulars given by Assistant United States Attorney Hitz six years earlier, to the effect that there was *no more limited inquiry at the Times hearing than the entire subject of Communist activity under the authorizing resolution* (J.A. 116-118):

"Q. I repeat my question: Did you ever say that the question under inquiry at the January 6 hearing was the scope and extent and activities of the Communist conspiracy against the United States?

"A. I believe I did, yes, sir.

"Q. And is that still your testimony?

"A. My opinion is, sir, that that was certainly a question under inquiry. . .

"Q. I am asking you whether those were your views at the time: That there was no more smaller, more limited inquiry than the whole scope of the authority of this committee?

"A. Yes, sir.

"A. Are they still your views?

"A. I will answer that one, if the Court will permit, with an explanation.

"Q. You may explain.

"The Court: Yes.

"The Witness: Yes, sir, they are still my views. But I recognize that there is a decision which might well be considered controlling, which now says that an indictment must contain, with more particularity, a statement of the subject under inquiry.

"My own interpretation of that decision is that there has been a natural confusion between investigation and inquiry. I think there is a little imprecision in the Court's statements on two points and I do not believe anyone will argue about it.

"The Court has stated, if I remember accurately, that it is necessary that there be a statement in the indictment respecting the subject under inquiry in connection with the refusals to answer. In connection with the questions refused. I am sure that what the Court meant was that there must be a statement somewhere in the indictment of the subject under inquiry with respect to each such question.

"Now, that brings me to my particular understanding of the situation, because, as I have explained it, the committee may shift a particular thrust of a question, just as a man driving from here to Philadelphia may go any number of routes or take side tracks and still get to Philadelphia, and for that reason it is perfectly possible that a question asked the witness one moment may not have precisely the same subject under inquiry as a question asked the next moment, if you are going to accept the argument that the state-

ment of subject under inquiry must be as narrow as possible, or must be narrowed within certain limits.

"Those questions might all be clearly within the statement under inquiry as I believe it may properly be stated. That is, in the terms of the committee's resolution. But, if you accept the view or if you are under the instructions that you have to state it with more particularity, of course the greater you narrow that down, the more things are going to be outside of it, and it is possible to narrow that down until it will only fit one particular question. I certainly would agree that there must be an indictment—a statement with respect to the subject under inquiry with respect to a particular question which forms the basis of a count.

"In my own opinion, and I do not think the Supreme Court has ruled on this yet, such a statement might be merely a statement of the committee's authority in the case of the Internal Security Subcommittee on an investigation such as this. If you want to narrow it down, I see no discrepancy between saying that we had under investigation at this time the whole range of our authority and this had not been narrowed and limited, and also stating that at this particular time we had under inquiry some particular segment of that authority, because I think the former statement necessarily embraces the latter."

It is difficult to understand on this record how appellant could possibly have been aware at the time of his interrogation, or how the Government could possibly have proved beyond a reasonable doubt at the trial, that Communism in news media was the delimited question under inquiry

at the Times hearings. Long after the hearings had concluded, it was the opinion of Assistant United States Attorney Hitz that "it is not the case, that there was any smaller, more limited inquiry being conducted" than Communist activities generally. As late as this second trial seven years after the hearings, Committee Counsel Sourwine adheres to that view, and reasserts that the whole range of the Committee's authorizing resolution was before the Committee.

Certainly there is no basis on this record for rejecting these admissions by the Assistant United States Attorney and the Counsel for the Committee, probably the two most knowledgeable attorneys in the nation concerning the operations and activities of this Senate Committee. If it was clear to Hitz and is still clear to Sourwine that the New York Times hearing of the Committee was not confined to any delimited question under inquiry narrower than the Committee's authorizing resolution, there is no basis on which one could find that a mere witness such as appellant clearly understood that there *was* a delimited inquiry being conducted by the Committee into the subject alleged in the second indictment. True, appellant knew from his colleagues that the hearings were directed at the New York Times, and that most of the witnesses were from the Times. But he could not know what Hitz and Sourwine did not know and have denied—that the Committee had narrowed its inquiry to an area more limited than its general authorizing resolution. The Government has thus clearly failed to prove a delimited question under inquiry beyond a reasonable doubt, and appellant's conviction must accordingly be reversed.

IV

Appellant's Interrogation Violated His First Amendment Rights.

In *Watkins v. United States*, 354 U.S. 178, 197, the Supreme Court provided pertinent reminder of the First Amendment's applicability to Congressional investigation: "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking." And, to emphasize its concern, the Court referred to the necessary "accommodation of the Congressional need for particular information with the individual and personal interest in privacy," and concluded (at 198) that "*the critical element is the existence of, and weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness.*"

Whatever might be said of the impact of the First Amendment when the Committee questioned other witnesses in its New York Times hearing (as to whom it might have had reason to believe them possessed of pertinent information),¹⁵ clearly the First Amendment imposes an

¹⁵ No one has ever suggested, not even Counsel Sourwine (R. 149), that the Communists ever had any measure of success in subverting the Times to the cause of Communism. Thus, all apart from the unique circumstances under which the First Amendment question arises with respect to appellant Shelton, we respectfully suggest that if the *Watkins* requirement of a judicial balancing of Congressional need against the First Amendment has any vitality, the New York Times hearing of 1956 intruded too far and with too little justification to withstand the force of the First Amendment.

insuperable bar to affirmance of this appellant's conviction. *Lacking any probable cause or reason to believe Shelton to have information pertinent to the Committee's inquiry, there is no "Congressional need" presented here for "accommodation . . . with the individual and personal interest in privacy."* There can be no Congressional need for the testimony of a victim of accident. And if, as the Supreme Court explained in *Watkins*, "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness," here the Court cannot properly give any weight to a Congressional "interest" in demanding disclosure by any or every member of the working press to check on "possible Communist Party activities among his fellow employees."

Moreover, while the hearing record is replete with protestations that the Committee was not investigating the press or the Times, the full record demonstrates the contrary (cf. R. 145-168). In its interrogation of Times witnesses, the Committee certainly did not restrict itself to questions about Communist Party membership and activity, but ranged widely into personal and private affairs.¹⁶ Indeed, there is evidence that the New York Times was consciously selected as a Committee target. Thirty of the 38 witnesses called at the 1955 Executive hearing were or had been connected with the Times and 15 out of 18 witnesses called at the 1956 public hearing were so connected (J.A. 141-144). In addition, Times witnesses were repeatedly asked about their employment status and conversations with the Times since the time the Committee had first called them, questions which could have no other purpose or effect than to embarrass the Times as to those already discharged

¹⁶ See, e.g., interrogations of Alden Whitman and James S. Glaser (Hearings, Part 17, pp. 1580 et seq.).

and coerce it as to those yet retained. See *Hearings, Strategy and Tactics of World Communism*, before the Senate Internal Security Subcommittee, 84th Cong. 2nd Sess., Part 17, pp. 1642, 1727, 1731-32, 1754-55, 1757-60, 1774, 1782-83, 1785-86.¹⁷

While it is commendable that the New York Times has retained appellant in its employ, the Committee's impact on the press cannot be measured by the courage of its most powerful representative. The content of the press is shaped by persons who write the news. The inevitable effect of wholesale interrogation and exposure of any alleged Communists or others the Committee could find on the New York Times, is necessarily to discourage newspapers from hiring persons of unpopular, unorthodox, or minority views, past or present, who may become the subjects of similar Congressional scrutiny. The resulting elimination of persons from the press who hold or held minority views, is as effective a form of censorship and restraint as the deletion of the material they could contribute to the press.

Finally, in the weighing of Congressional need for forcible disclosure against First Amendment liberties and privacies, it is of significant import that the Committee has been unable even hypothetically to justify any "need" for its forced disclosures. On the witness stand, Senator Eastland could not think of any bill which the Committee

¹⁷ Nor can the infringement on First Amendment rights be taken out of the context of the entire questioning to which appellant was subjected. When appellant read a respectful statement explaining why he thought he was within his rights in refusing to answer some of the questions addressed to him, the Committee subjected him to needless humiliation and embarrassment. It asked him if he knew his counsel, a distinguished non-Communist civil libertarian, to be a Communist (J.A. 53). It demanded to know who had helped him in writing the statement he made to the Committee (J.A. 56-57, 84) and it further demanded to know the content of private conversations he had with his employers at the New York Times (J.A. 86).

had ever proposed or considered proposing on the subject of Communism in news media (J.A. 207-208). What is more, when asked by counsel to exercise his imagination, Senator Eastland could not even think of any legislation which the Committee *might* propose on this subject (J.A. 209-210). Certainly, in the required "accommodation of the Congressional need for particular information with the individual and personal interest in privacy," it is significant that the Committee cannot even hypothetically suggest any legislative need for the disclosures it sought from appellant.¹⁸ We submit that under these circumstances, the Committee's interrogation of appellant squarely transgresses the fundamental freedom guarantees of the First Amendment. In the words of Mr. Justice Douglas concerning the Times hearings in this very case (369 U.S. 773, at 776):

"... The theory of our Free Society is that government must be neutral when it comes to the press—whether it be rightist or leftist, orthodox or unorthodox. The theory is that in a community where men's minds are free, all shades of opinion must be immune from governmental inquiry lest we end with regimentation. Congress has no more authority in the field of the press than it does where the pulpit is involved. Since the editorials written and the news printed and the policies advocated by the press are none of the Government's business, I see no justification for the Government in-

¹⁸ Like Senator Eastland, the trial judge could state no legislative purpose. Though appellant's request for special findings pursuant to Rule 23(c) specifically requested the District Court to find *what* was the legislative purpose (J.A. 228), the Court could do no better than to assert that it "has no doubt that these hearings were conducted in furtherance of a legislative purpose . . ." (J.A. 241). This not only buttresses appellant's position that there was no legislative purpose, but raises the additional question whether a rambling opinion that fails to answer significant questions put by a defendant under Rule 23(c) can be deemed to satisfy the requirements of that Rule.

vestigating the capacities, leanings, ideology, qualifications, prejudices or politics of those who collect or write the news. It was conceded on oral argument that Congress would have no power to establish standards of fitness for those who work for the press. It was also conceded that Congress would have no power to prescribe loyalty tests for people who work for the press. Since this investigation can have no legislative basis as far as the press is concerned, what then is its constitutional foundation?"

V

Senate and Committee Rules Were Violated in the New York Times Hearings.

Appellant demonstrated in the prior proceedings (see R. 140), as he does here, that the Committee grossly violated its own rules in its New York Times hearings. The recent decision of the Supreme Court in *Yellin v. United States*, 31 L.W. 4727, is thus controlling, for the Court has now held that Congressional witnesses may not be interrogated in violation of rights granted by the rules of the committees themselves.

Senate Resolution 366, which the Committee claims as its authorizing resolution from the Senate,¹⁹ provides that

¹⁹ It must be noted that the prosecution never proved an actual delegation by the Judiciary Committee to this Subcommittee, of the authority contained in S. Res. 366. The absence of such a direct authorizing resolution was made manifest by the indictment (J.A. 1) which referred to a Judiciary Committee extension of the Subcommittee rather than any original resolution conferring authority under S. Res. 366 to the Subcommittee. Nor was the prosecution able to produce at trial any minute or resolution of the Judiciary Committee containing a direct authorization to this Subcommittee of power under S. Res. 366. This defect in proof appears dispositive of the critical authority issue. See *Tobin v. United States*, App. D.C., 306 F. 2d 270 cert. den. 371 U.S. 902.

the subpoena power may be employed by the Committee on the following terms:

"SEC. 2. The committee, or any duly authorized subcommittee thereof, is authorized . . . to hold such hearings, to require by subpoenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents . . . *as it deems advisable* . . . Subpoenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman." (Emphasis supplied).

Limitations upon the Committee's investigative power are also found in Rule No. 1, which provides: "No major investigation shall be initiated without approval of the majority of the subcommittee (R. 140)."

The vital restrictions upon compulsory investigative power found in these rules of the Senate and the Committee, were clearly transgressed in its New York Times hearings. For the record before this Court makes clear that the entire discretion and authority of the Committee to schedule hearings, choose witnesses, and determine the subject of their questioning, had been delegated to the discretion of Committee staff member Sourwine. The record demonstrates (1) that no Committee meeting was had before either of the Times hearings to approve them or define their scope, and (2) that Sourwine alone determined what witnesses were to be subpoenaed and what they were to be questioned about.

The first contemporaneous indication of the manner in which the Times hearings were scheduled came from a conversation in November of 1955 between James Reston of the Times and Chairman Eastland. Reston's report of Eastland's statements to him (J.A. 200), which Eastland

does not deny (J.A. 202), indicated that the Senator had no knowledge about the issuance of the Times subpoenas, the calling of the hearings, or anything about them. At the open hearing in January 1956, Senator Hennings stated "I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings . . ." (J.A. 72), and pointed out that, "we have no list of prospective witnesses, nor has any offer of proof as to what their testimony is likely to be given to this subcommittee" (J.A. 66). Further on in the hearing, with reference to whom the Committee should call the Senator stated: "I would like to suggest to the Chairman that occasionally we do have an executive session of the committee so that counsel may make an offer of proof, as we do in court, to determine some of these close cases" (J.A. 68).

Evidence concerning the inception of the hearings is also found in the testimony of Committee Counsel Sourwine. He testified at the previous trial that the Committee had not met to approve the holding of the Times hearings.²⁰ At the trial below, Sourwine adhered to this testimony. He stated that the Chairman alone approved the holding of the January public hearing, and that there was no Committee meeting setting any question under inquiry for the hearing or approving the list of witnesses (J.A. 106-108).

On this evidence one would think it undeniable that the Committee violated its very first rule, requiring advance approval of hearings. But Senator Eastland, testifying below, was adamant in his insistence that it was his uniform

²⁰ "If you are asking me whether there was in terms a Committee approval, a Subcommittee resolution approving the inauguration of the hearings in New York, I shall have to state that there was not" (R. 140).

practice to obtain advance Committee approval for hearings, and that he must have done so in this case, though he had no specific recollection of having done so (J.A. 187-196). Senator Eastland's assurance of prior Committee approval was contradicted by the testimony of Counsel Sourwine and the revelation at the hearing by Senator Hennings that no prior Committee meeting had been held. And it is also contradicted by Senator Eastland's *own* announcement at the time of the hearing that after having been unable to reach Senator Hennings who had chaired the executive sessions in New York, "*I discussed the testimony and set these hearings*" (J.A. 68):

"The Chairman. Now, let the chairman state right there that the chairman was not at the executive sessions in New York City. The Senator from Missouri conducted those sessions. And after the conclusion, I tried to reach him for a number of days and was informed by his office that he could not be reached.

"So, I discussed the testimony and set these hearings, and I think I took the right position and the only position that I could take."²¹

As clear as is the evidence that the Committee violated its own first rule requiring advance approval of hearings, the evidence is even clearer that contrary to the restrictions in S. Res. 366, the discretion to exercise the power of subpoena in these hearings was in the hands of Counsel Sourwine rather than the Committee itself.²² Sourwine testified

²¹ Senator Eastland's assurance of prior Committee approval came to him quite belatedly. In 1957, testifying at the trial of another New York Times employee on charges of contempt at these same hearings, Senator Eastland said he "wouldn't know" "when it was decided to go into this field of mass communications . . ." (J.A. 218).

²² Since the evidence is clear that staff member Sourwine had the full authority to choose witnesses to be subpoenaed, it becomes unnecessary

(J.A. 37) "I thought I was in control of the list" of witnesses for the hearings. While he obtained the signature of Senator Eastland on the subpoenas, Sourwine gave Eastland merely his conclusion about the witnesses: "I was telling the Chairman the conclusions I had arrived at . . . I was not giving him information to support those conclusions" (J.A. 32). Sourwine admitted that he did not give Eastland information about individual witnesses but merely his own judgment that they had information to give (J.A. 121):

"A. . . . What I was trying to convey to him was that in any event, in my judgment the committee had information which led me to believe that all of these people had information to which they could testify if they would, that would further our investigation.

"Q. And you did not—am I correct—give case by case reasons for each of them?

"A. I did not."

Moreover, there were not even guiding principles for Sourwine's selection of the witnesses to be subpoenaed:

"Senator Eastland has never laid down to me rules with regard to choosing witnesses. I have made him recommendations. There have been occasions when he has asked, 'Why do you want this one?' or 'Why do you want that one?' But he has never laid down a

to decide whether under S. Res. 366 it was the Committee or the Chairman who was given authority to select witnesses to be subpoenaed. It must, however, be noted that S. Res. 366 expressly states that it is the *Committee* which is to require the attendance of such witnesses "*as it deems advisable*." The further statement that "subpoenas shall be issued by the Chairman" must be deemed to give the Chairman only the ministerial power of issuance, not the discretion to select witnesses, which the earlier language ("*as it deems advisable*") vests in the Committee itself. The record here is uncontested that the Committee members were wholly unaware when the January hearing commenced, of who the witnesses were to be.

general theory of rules under which I must make recommendations" (J.A. 133).²³

The power of compulsory process for the attendance of witnesses and the production of evidence has been upheld as an adjunct of inherent Congressional power to investigate for legislative purposes. But it is a predicate of that principle—reflected in S. Res. 366 itself in its subsection of the subpoena power to the judgment of the Committee—that Congress and its committees must direct and control its exercise. Delegation of discretion to committee staff members to wield the power of compulsory process over citizens, exceeds the permissible power of Congressional compulsion in aid of legislation.

The New York Times hearings of the Committee were called and conducted entirely by Counsel Sourwine without prior Committee approval, and even the selection of witnesses had been wholly delegated to Sourwine. Since applicable Senate and Committee rules were thus transgressed, and the power of Congressional process improperly delegated to Committee staff at the hearings of January 1956, it is submitted that appellant must be acquitted. See *Yellin v. United States*, 31 L.W. 4727, decided June 17, 1963.

²³ So loose was the practice of the Committee with respect to subpoenas that the Committee did not even have any method for withdrawing subpoenas. In response to question of counsel, "Do you have any procedure for quashing subpoenas, Senator, before your subcommittee?" Eastland answered (J.A. 202), "Oh, I judge I could withdraw a subpoena. I have never looked into it."

Looseness, too, appears in the failure of the Committee to "keep any records of why they subpoena people" (J.A. 199). Thus, not only did Sourwine make the lists, giving the Chairman only his "conclusions", but he was not even required to keep any records of his reasoning for the information of the members of the Committee.

Conclusion

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,904

ROBERT SHELTON, APPELLANT

v.

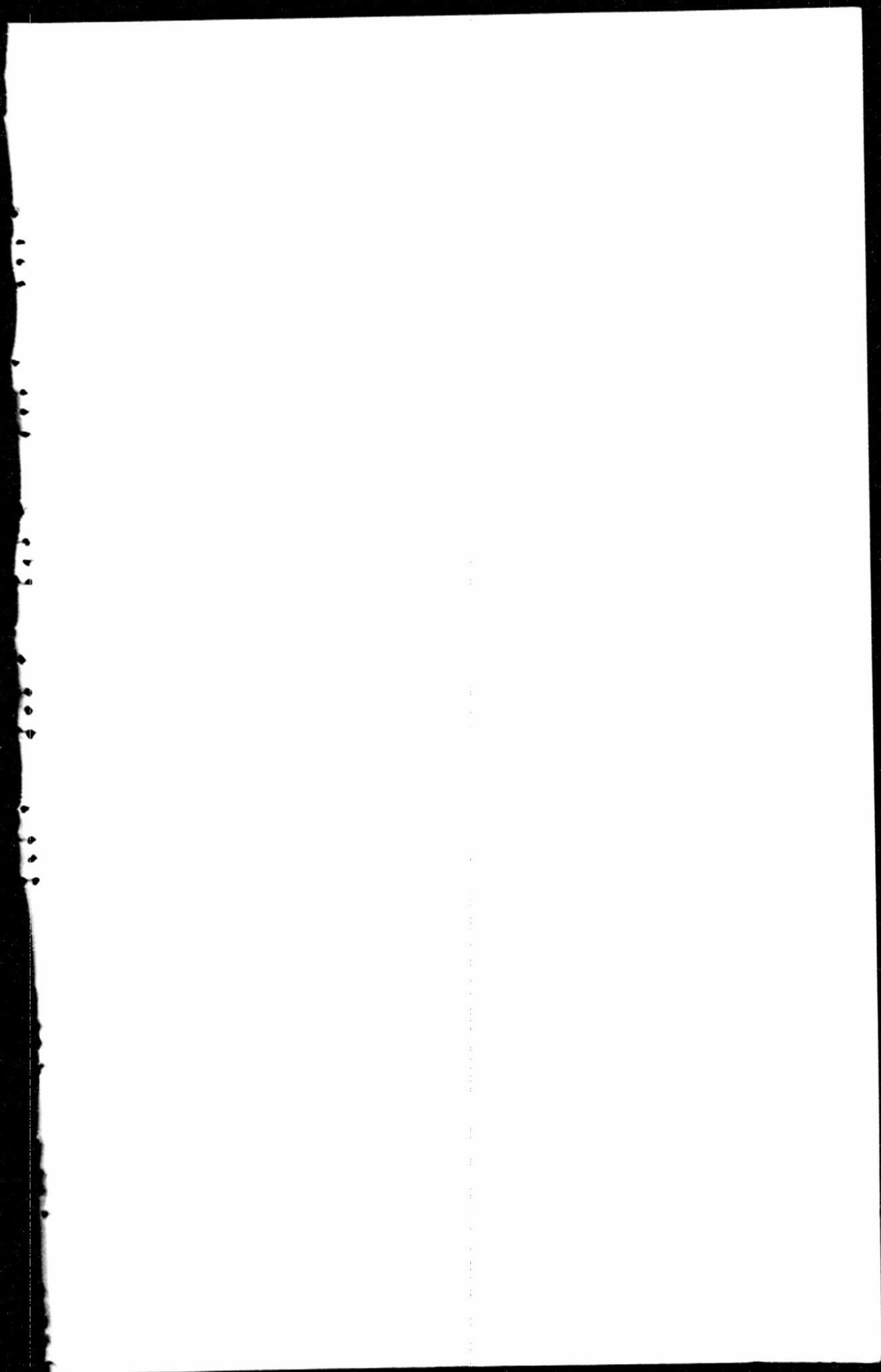
UNITED STATES OF AMERICA, APPELLEE

**Appeal From The United States District Court
For The District of Columbia**

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United States Attorney.

WILLIAM HITZ,
FRANK NEBEKER,
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No. 17,904

COUNTERSTATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee, the questions presented by this case are:

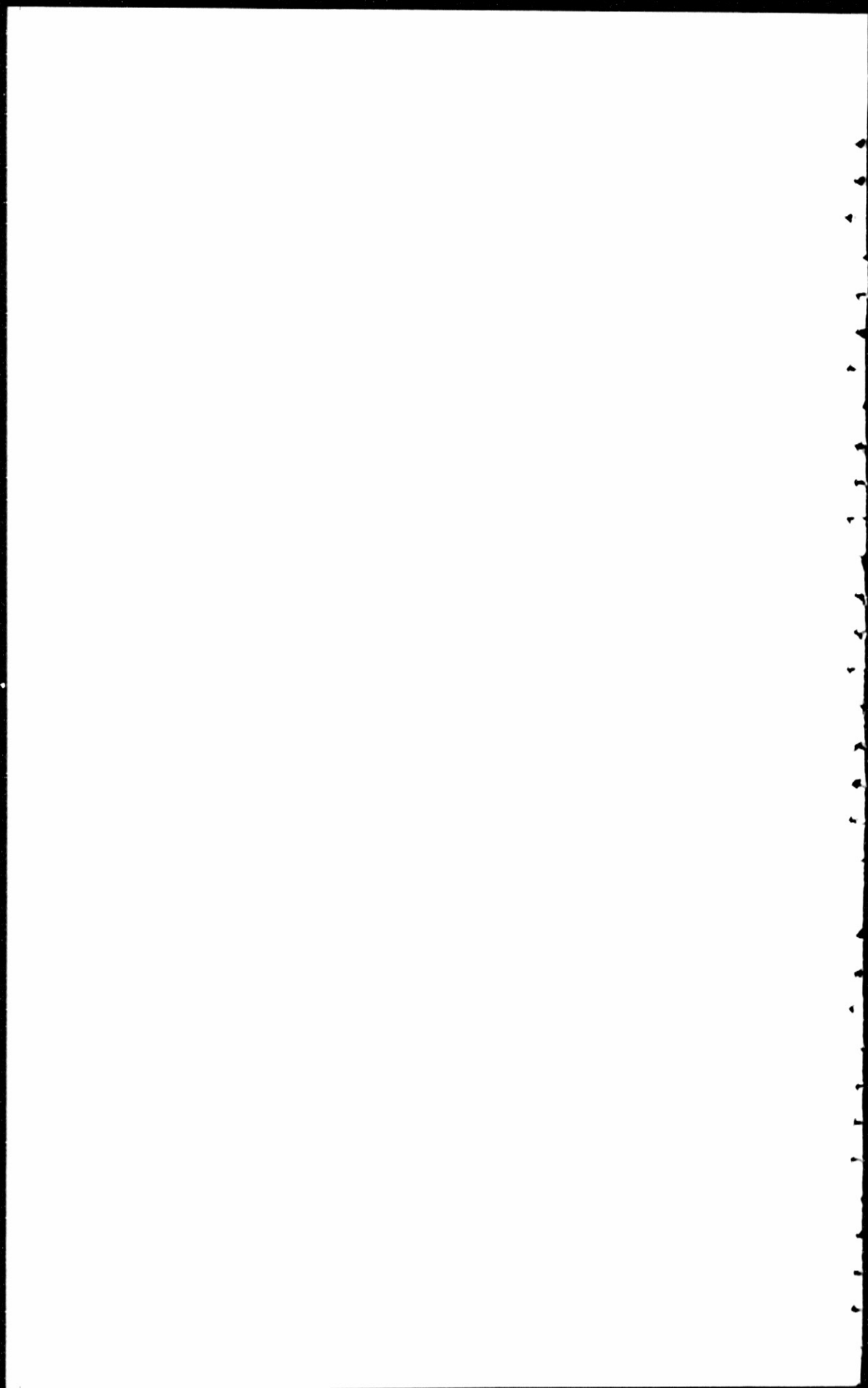
1. Did the evidence produced at trial establish that when appellant appeared before the Senate Internal Security Subcommittee, a subject under inquiry was, as alleged in the indictment, communist activity in news media?

2. Does the Fourth Amendment apply to subpoenas to testify issued by Congressional committees?

3. Did the Subcommittee's investigation of Communist activities in news media violate the First Amendment?

4. After his conviction on a prior indictment which failed to allege a subject under inquiry had been reversed for such omission, may the appellant be retried under a new indictment alleging as the specific subject under inquiry the subject that had been proved at the first trial and held by this Court to be the subject under inquiry when appellant refused to answer?

5. Is reversal required by violations of Senate and Subcommittee Rules?



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CONSTITUTION AND STATUTES

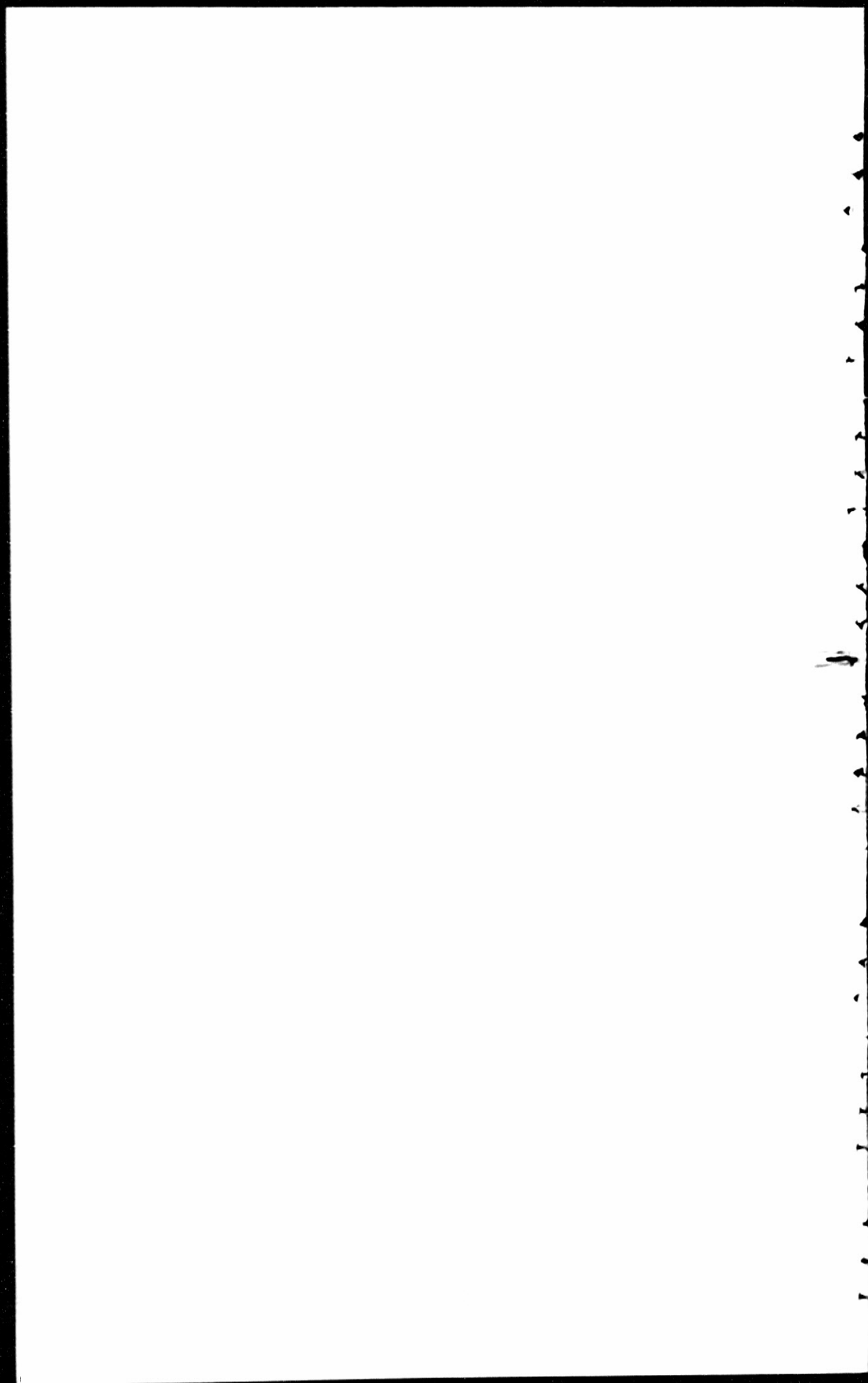
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,904

ROBERT SHELTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a two-count indictment with having unlawfully refused to answer two questions pertinent to matters under inquiry by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary (J.A. 1-2).¹ Having waived his

¹ As in appellant's brief, references here to "J.A." are to the Joint Appendix filed with this Court, and references to "R." are to the printed record prepared for the Supreme Court upon review of appellant's first conviction and filed by appellant with this Court in this proceeding. "Tr." refers to parts of the transcript not reproduced in the Joint Appendix.

right to trial by jury (Tr. 3), appellant was found guilty by the district court on both counts (J.A. 246). Appellant was sentenced to six months' imprisonment and to pay a fine of five hundred dollars on each of the two counts, with the sentences of imprisonment to run concurrently (Tr. of March 15, 1963, p. 4).

Appellant had been charged with the same offense in an indictment returned in November of 1956 (J.A., No. 13,737, pp. 7-9). Upon trial of that indictment, he was convicted and the conviction was affirmed by this Court on June 18, 1960 (R. 232-244; 280 F.2d 701, 108 U.S. App. D. C. 153). The Supreme Court reversed the conviction, along with the conviction in five other contempt of Congress cases, in *Russell v. United States*, 369 U.S. 749, decided on May 21, 1962. Since the statute of limitations (18 U.S.C. 3282) had expired on January 6, 1962, the indictment at bar was returned under the provisions of 18 U.S.C. 3288.

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Senate Internal Security Sub-Committee heard the testimony of Winston Burdett, a newspaperman and broadcaster, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws (Gov't. Ex. 5, J.A. 102; R. 71; Hearings, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate [hereafter "Hearings"], 84th Cong., 1st Sess., Part 14, pp. 1324-1363). Burdett, who said that he was a Party member from 1937 until the early 1940's, testified concerning attempts of the Communist Party to influence public opinion by infiltration of Party members into the newspaper field. He stated that he became a member of the Party's unit on the Brooklyn Eagle in 1937 while employed by that newspaper (Hearings, Part 14, p. 1324); that the unit included several reporters and editorial writers (*id.* at pp. 1325-1327, 1359-1360); that Party leaders induced

him to become a foreign correspondent for the Eagle in order to use his position to act as an espionage agent for the Soviet Union and that he continued these activities while subsequently employed by Trans-radio Press and the Columbia Broadcasting System during World War II (*id.* at pp. 1328-1341, 1347-1353); and that employees of other New York newspapers had been Party members around 1940 (*id.* at pp. 1360-1363).

Subsequent to Burdett's testimony, the Subcommittee received information that a man by the name of "Shelton," said to be employed on the news side of the New York Times, was connected with a Communist group among the staff of that organization, and that he should be able to furnish the Subcommittee with information concerning Communist activity (J.A. 121, 154). The first name of the person identified as "Shelton" was not given. Although this information came to the Subcommittee in a letter signed with the pseudonym "Finbar", the identity of the writer was known to the former associate counsel of the Subcommittee, Robert Morris (J.A. 155). The writer was considered to be reliable since other information he had given the Subcommittee had been checked and found to be correct (J.A. 155, 157).²

² This letter was destroyed. Subcommittee counsel testified, by him "along with a great deal of other information in the files of the committee which was no longer useful and needed" (J.A. 124) when the committee moved its offices to the New Senate Office Building in the second quarter of 1959 (J.A. 136-137). Mr. Sourwine explained that he had, in the process of consolidating the Subcommittee's documents, removed a packet of letters of which this particular letter was one, and placed it en masse with other papers marked for destruction (J.A. 129). He made the decision of the entire packet's uselessness, he testified, without seeing the particular letter, without regard to its content, and without the consciousness that it pertained to active litigation (J.A. 129-132, 152-153, 166-169, 173-175, 177-178). Mr. Sourwine stated that he had always assumed that the elimination of duplicate or obsolete material in the Subcommittee's files inhered in his responsibilities as Subcommittee counsel (J.A. 129). Although the Chairman of the parent committee, Senator Eastland, testified that he had not explicitly authorized counsel to destroy useless documents, he testified that such authority was a natural part of counsel's powers (J.A. 213-214).

Although the Subcommittee was still unaware of Mr. Shelton's first name, a subpoena was issued, addressed to "Willard Shelton" at the New York Times in New York City (J.A. 36-37). This name was a mistake since Willard Shelton was not the person actually sought by the Subcommittee. (J.A. 36-37, 164). The Subcommittee employee who went to New York City on November 16, 1955, to serve the subpoena, along with other subpoenas, ascertained that no Willard Shelton was employed by the New York Times (J.A. 155). He was told that a Robert Shelton (the appellant) was an employee of that organization and he was the only "Shelton" on the editorial or news side (J.A. 39, 155). When that information was conveyed to Subcommittee counsel, counsel caused a new subpoena to be issued on November 23, 1955, for Robert Shelton, and it was served on appellant by a Deputy United States Marshall (J.A. 39, 40, 42).

At the time that the subpoena was issued and before appellant's first appearance, the Subcommittee had several leads under the surname Shelton (J.A. 157). Because of this information, the Subcommittee desired to question appellant concerning whether he was the Shelton who was not sufficiently identified by the Subcommittee's files (J.A. 157-158).

Appellant, represented by counsel, first appeared at an executive session of the Subcommittee, in New York City on December 7, 1955 (J.A. 42-44, 50). Appellant was advised by Subcommittee counsel that the purpose of the appearance was to clarify the question of identity (J.A. 46, 50-51). Upon being queried as to Communist Party membership, appellant immediately responded that he had a statement to read (J.A. 47). The statement, which was then read, objected in substance to the Subcommittee's inquiry into appellant's Communist Party membership on the grounds that the Subcommittee lacked jurisdiction and the inquiry infringed his rights under the First Amendment of freedom of speech and, since he was a newspaperman, of the press (J.A. 47-49). Subcom-

mittee counsel then told the Subcommittee that he was surprised by appellant's refusal to answer the questions since appellant was subpoenaed only for purposes of identification and he was not charged with being a Communist (J.A. 50-51).

The Subcommittee held public hearings in Washington, D. C. on January 4, 5, and 6, 1956 (Gov't Ex. 8). At the opening of the hearings on January 4, Senator Eastland, the chairman of the Subcommittee, announced that the hearings about to commence "stem from sessions of this Subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster" (J.A. 70). Burdett had, the chairman continued, disclosed the names of persons whom he knew as members of the Communist Party in the early 1940's. The chairman concluded that the investigation was of great importance because (J.A. 71):

[A]mong the persons involved in this investigation have been many who were or are members of the press, and . . . the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. . . . The present hearings open up a subsequent chapter to the Burdett testimony. . . .

Following the opening statement, another member of the Subcommittee, Senator Hennings, apparently apprehensive that the public might misconstrue the purpose of the hearings, further explained (J.A. 72):

[T]his is not in any sense an attack upon the free press of the United States. . . .

Of course, the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency. . . .

[T]his is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the

part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.

In response, the chairman approved Senator Hennings' description of the purpose of the hearings as a "very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety" (J.A. 72). The Chairman went on to say (J.A. 72):

We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

Eighteen witnesses were called by the Subcommittee to testify at the hearings on January 4, 5 and 6, 1956. All had been or were then employed in mass communication. Clayton Knowles, who had previously given the Subcommittee information on Communist activity in newspapers (J.A. 65), was among the witnesses called to testify on January 4. Knowles testified that he was then a reporter for the New York Times; that he was a member from 1937 to 1939 of the Communist Party unit of the Long Island Daily Press where he was a reporter; and that Party members at that time had positions of importance and exerted considerable influence in the American Newspaper Guild (Hearings, Part 17,³ pp. 1635-1642).

On January 6, 1956 (two days later), immediately preceding appellant's testimony, the hearings opened with the reading of a telegram sent to the Subcommittee by a New York newspaper, the Long Island Daily Press, in which that newspaper agreed with the Subcommittee's efforts to expose Communist infiltration wherever found (J.A. 64). The chairman, in responding to the telegram,

³ Part 17 of the Hearings is entitled *Strategy and Tactics of World Communism (Communist Activity in New York)*.

repeated that the hearings were directed to investigating Communist infiltration into news agencies (J.A. 65). Senator Hennings stated (J.A. 66) :

I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

The Subcommittee then called appellant to testify. At appellant's trial, Counsel Sourwine stated that (J.A. 59-60) :

I presented the Chairman with a list of persons who had testified in Executive Session, whom I recommended be recalled for public session, because in my judgment they were people who had information that would be valuable to the committee. The Chairman approved the entire list as recommended.

Mr. Sourwine further testified that " * * * 'the Communist infiltration in news media' was a subject under inquiry at this hearing", and stated that there could be more than one subject under inquiry (J.A. 111). Of the view that "the whole scope of the committee's responsibility is always under inquiry every time they sit unless the committee, itself, has limited a particular hearing to a narrower field" (J.A. 114), Mr. Sourwine testified concerning this particular hearing that:

we were interested of course, back of the matter of communist infiltration of news media, and the general subject of Communist activity in the United States—and including espionage and subversion—we were interested in the specific subject of Communist infiltration into mass communications. Within that Communist infiltration in the news media. (J.A. 111-112).

* * * the vast majority of all the questions asked of all, or certainly a majority of the witnesses in this series of hearings did have to do with Communist infiltration in news media. (J.A. 112).

In response to a request for an enumeration of the other subjects of inquiry, Mr. Sourwine prefaced his specification of what he considered the two principal subordinate inquiries (infiltration of (1) the news side of the Times and (2) the mechanical side, particularly concerning Matilda Landsman and the typographical union) with the statement that:

* * * we had under inquiry at this time a number of subordinate questions which could well be summed up in the phrase 'Communist infiltration of news media.' (J.A. 113).

At the start of his testimony before the Subcommittee on January 6, before he was sworn, appellant interposed several objections to his having been called to testify. These objections included: an objection to the jurisdiction of the Subcommittee on the ground that appellant's testimony in executive session made clear that no information would be obtained relating to the Subcommittee's legislative purpose; the claim that questioning "might subject me to prosecution in violation of my right to be tried in the community where I work and live"; and the statement that he did not "see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles" (J.A. 73-74).

After having been sworn, appellant gave his name and stated that he had been employed first as a news clerk and then as a copy editor on the New York Times for the previous five years (J.A. 74-75). Appellant was then asked: "Are you, sir, a member of the Communist Party, U.S.A.?" (J.A. 75). After consultation with his counsel, appellant said that "I decline [to answer] on the grounds of the first amendment and challenge to the jurisdiction of the committee" (J.A. 76). He was then permitted to read a lengthy statement in which he restated his refusal to answer the question on the basis of the First Amendment and the lack of jurisdiction of the

Subcommittee to investigate beliefs and associations (J.A. 77-80). These objections were predicated principally on the claim that the Subcommittee was investigating newspapers, which violated freedom of the press. The objections were overruled by the chairman, who ordered him to answer the question (J.A. 81, 83). Appellant persisted in his refusal to answer the question on the grounds set forth in his statement (J.A. 82, 83), and Count 1 of the indictment was predicated upon this refusal (J.A. 2).

Later in the hearing, appellant refused to answer, on the basis of the two grounds given in his written statement, whether he was acquainted with any person whom he knew to be members of the Communist Party, whether he had ever attended Party meetings, and whether he knew Matilda Landsman. As disclosed at the trial, Matilda Landsman was believed by the Subcommittee to be an employee of the New York Times at the same time appellant was on the Times, first as a secretary and, after resigning to take linotype training, as a journeyman linotype operator in the typographical department; a member of the Communist Party who had participated in the Party's attempt to take over the typographical Union (J.A. 33-35, 98-99, 100-101). Appellant denied having "any knowledge respecting a Communist attempt to take over control of Typographical Union No. 6" or having "discuss[ed] with Matilda Landsman the question of any Communist activity in that union" (J.A. 85). Following these denials, he was then asked (J.A. 85):

Now, for the purpose of testing the credibility of that answer, sir, I will ask you, did you ever have any conversation with Matilda Landsman?

Appellant refused to answer this question on the grounds set forth in his prepared statement. The chairman ordered appellant to answer the question on penalty of contempt of the Senate, but appellant persisted in his refusal based on these same grounds (J.A. 85-86). Count

2 of the indictment was predicated upon this refusal (J.A. 2).

STATUTES, RESOLUTIONS AND RULES INVOLVED

2 U.S.C. 190 (b), 60 Stat. 831, set forth below at p. —.

2 U.S.C. 192 (R.S. 102, as amended), set forth in appellant's brief at pp. 16-17.

Senate Resolution 366, 81st Cong., 2d Sess., set forth in appellant's brief at pp. 17-18.

Rules of Procedure, Internal Security Subcommittee of the Senate Committee on the Judiciary, set forth as Appendix I *supra*, pp. — to —.

SUMMARY OF ARGUMENT

I.

The evidence produced at trial established that the subject under inquiry alleged in the indictment was a subject under inquiry at the time of appellant's refusal to answer.

The Government's burden of proof in reference to the subject under inquiry may arise from either of two different issues. If a witness challenges the pertinency of the questions at the time of his appearance, the Government at trial must prove that the witness has been apprised of the subject under inquiry. *Watkins v. United States*, 354 U.S. 170. If no such objection is made, however, the prosecution's burden at trial is to prove, as a matter of law, that the cited questions were pertinent to a subject under inquiry by the body calling the witness. *Deutch v. United States*, 367 U.S. 456. Appellant did not raise the issue of pertinency before the Subcommittee and the Government was not required to prove that appellant was apprised of the subject under inquiry. The question before this Court, therefore, is whether or not the Government proved at trial that, as alleged, Com-

munist activity in news media was a subject under inquiry when appellant refused to answer the questions which formed the basis for his indictment.

The Government's proof on this issue was comprised of the Subcommittee's authorizing resolution, and the transcripts of the hearings at which appellant appeared. The transcripts, of course, were evidence of the statements of the Chairman of the Subcommittee and of its members, and of the nature of the proceedings themselves. In short, the Government's proof consisted of the relevant indicia of the subject under inquiry enumerated by *Watkins, supra*. Both trial courts, and this Court, in reviewing the Government's evidence have consistently held that the alleged subject under inquiry—communist activity in news media—was a subject under inquiry at the time of appellant's Subcommittee appearance, and such is clearly the case.

Moreover, though the issue of whether or not appellant was apprised of said subject at the time he refused to answer the questions is not an issue in this case, the same indicia and the statements of appellant himself establish that he was fully aware of the subject under inquiry at that time. At the beginning of the hearings, the chairman clearly stated that the Subcommittee's purpose was to investigate Communist activity in news media. While appellant did not appear before the Subcommittee until two days later, he showed his awareness of the contents of the chairman's opening statements as well as of the testimony of two other witnesses before the Subcommittee concerning Communist infiltration of communications. Moreover, appellant was presumably in the committee room when, only a few minutes before he appeared, two members of the Subcommittee clearly identified the subject of the investigation as Communist infiltration of newspapers and other methods of communication. And almost all of appellant's statement giving his reasons for refusing to answer the Subcommittee's questions is de-

voted to the claim that investigation of the newspaper field violated freedom of the press.

Appellant claims that four different subjects under inquiry have been stated by the government at various stages of this case. All these statements mentioning other subjects are fully consistent with the assertion that the subject of investigation was Communist activity in news media. For example, this subject is part of the larger subject of Communist activity in the United States generally, while Communist activity on the New York Times is part of Communist activity in news media.

II.

Subpoenaing of appellant to testify before the Subcommittee did not violate the Fourth Amendment.

The Fourth Amendment pertains only to subpoenas *duces tecum*, not to subpoenas to testify. The language of the Amendment itself makes clear that it was intended to protect "persons, houses, papers, and effects" only from improper search or seizure. And the Courts have never applied the amendment to subpoenas to testify. While in *Barenblatt*, 360 U.S. 109, *Braden v. United States*, 365 U.S. 431, and *Wilkinson v. United States*, 365 U.S. 399, the Supreme Court indicated that a Congressional committee can subpoena a witness only on the basis of probable cause, this requirement resulted from the First Amendment consideration and from the need for a valid legislative purpose; the Fourth Amendment was not even mentioned.

Even if the Fourth Amendment can be invoked, it was not violated in this case. In *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209, which involved an administrative subpoena *duces tecum*, the Supreme Court held that the requirement of probable cause under the Fourth Amendment is satisfied if "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." There is no reason to apply a stricter standard

to subpoenas to testify than to subpoenas *duces tecum*, or to Congressional committees than to executive agencies. Here, the investigation was authorized by Congress, and had a purpose Congress could order; and the questions appellant was asked were pertinent to the subject under inquiry.

Since the Fourth Amendment does not apply to subpoenas to testify, the alleged failure of the Subcommittee to explain to appellant why he was called was not a denial of due process. And, if the Fourth Amendment were held to be applicable, the appellant had available to him the proper information to judge whether or not the applicable standards, just discussed, were satisfied. The authorizing resolution spelled out the Subcommittee's authority and is a matter of public record. The subject under inquiry was clearly discernible and, in any case, accessible to appellant at his request. He could, therefore, make a judgment as to whether or not such an inquiry was within the Subcommittee's authority and if the questions were relevant.

III.

The Subcommittee's investigation of Communist activities in news media did not violate the First Amendment.

Under the controlling law of *Barenblatt v. United States*, 360 U.S. 109, a Congressional investigation of Communist activities—even in a field, such as the press, which is protected by the First Amendment—is a constitutionally permissible investigation because Congress can legislate concerning Communist activities. The Subcommittee's legislative purpose in this inquiry is clearly revealed by the evidence in the record, and appellant's contention that the legislative purpose was destroyed because the inquiry focused not on Communist activity but on the press itself and the New York Times in particular, is just as clearly rebutted by the record.

The validity of the legislative purpose, entitled to great weight by virtue of the corollary doctrines of separation

of powers and presumption of validity due the proceedings of a coordinate branch of government, here prevails over appellant's claim that he was subpoenaed without "probable cause" to believe that he could aid the inquiry. Under *Barenblatt, supra*, "probable cause" arises in a First Amendment context and is, in essence, an assertion of a negative—lack of "probable cause"—which appellant must substantiate from the record. As this Court held with regard to appellant's first conviction and upon virtually the identical evidence, there is nothing in the record to suggest that appellant, as an employee on the editorial side of the New York Times, was subpoenaed for any reason other than to aid an inquiry into Communist infiltration in news media, particularly the editorial and mechanical departments of the New York Times.

If it be necessary, although this Court has held that it is not, for the government to show that the Subcommittee had specific information concerning appellant which led it to the reasonable belief that his testimony could be of value to its investigation, there is evidence in the record to show that the Subcommittee had received a letter under pseudonym from a reliable informant which stated that a Shelton on the news side of the Times was connected with the Communist Party. This letter led the Subcommittee to appellant, the only Shelton so employed, who was subpoenaed both to clarify the question of identity and to elicit his knowledge concerning the subject of inquiry.

IV.

Retrial did not prejudice appellant's right to a fair rebuttal.

Appellant argues that the oral bill of particulars furnished by the Assistant United States Attorney prior to the first trial bound the Government to the position that the only subject under inquiry was that stated in the authorizing resolution, i.e., Communist activity generally and

that, as a result, the Government cannot, at the second trial, proceed on an indictment alleging the lesser, more specific inquiry or Communist activity in news media. But the Assistant United States Attorney made clear that he was merely saying that the authority of the Subcommittee included Communism generally—which obviously includes the more particularized subject of Communist activity in news media. Even if there was a variance between the government's proof and the bill of particulars, it is well established that the government can amend its bill of particulars as long as the defense is protected against surprise. If appellant is correct in his interpretation of the oral bill of particulars, the government in effect amended it later. And appellant did not claim that he was surprised at the first trial by the government's reliance on the Subcommittee's clear statements made at the hearing as to the subject under inquiry. If the government was not stopped at the first trial from proving a specific subject under inquiry, it was certainly permitted to proceed under a new indictment alleging that specific subject.

Nor was appellant's defense prejudiced because of the unavailability of Senator Hennings' testimony on the issues of the subject under inquiry and of whether or not there was prior approval of the hearings, or because of the alleged present inability of Senator Eastland to recall the details of the Subcommittee's action in authorizing the hearings. The documentary evidence of the subject under inquiry is conclusive and could not have been overcome by subsequent oral testimony, even if inconsistent. Moreover, the same evidence shows that the testimony of Senator Hennings would have supported the government's proof.

The evidence of prior subcommittee approval of the hearings is also clear. Senator Hennings' statements at the hearings establish that the executive committee hearings were authorized, and Senator Eastland's testimony concerning approval of the public hearings was clear and

convincing and, again, Senator Hennings' statements are not inconsistent. In any event, the question of Subcommittee approval was equally present at the first trial and could have been fully explored with both Senator Hennings and Senator Eastland. And, as discussed under V below, the participation in the hearings by a majority of the Subcommittee would constitute, without more, approval of the hearings. Finally, the remaining members of the subcommittee were available to testify, and their availability would negate the alleged prejudice.

V.

Reversal is not required by violations of Senate and Subcommittee Rules.

Yellin v. United States, 374 U.S. 109, which held that a witness before the House Committee on Un-American Activities was entitled to the protection of the rights guaranteed by the Committee's Rules, is not applicable. In reversing petitioner's conviction for contempt in that case, the Court relied on the fact that the rules in question were in fact formulated to provide rights to the witnesses. In direct contrast to the House Committee Rules applied in *Yellin*, however, the Subcommittee Rules were not intended to, and do not, grant rights to witnesses, but are rules directed to the Subcommittee itself to govern its internal management. That being so, *Yellin* is not applicable.

Even if *Yellin* were applicable, it is not dispositive of the issue here because the rules were not violated. Appellant contends that the hearings had not been approved by the Subcommittee. But, Senator Hennings, who conducted the executive hearings, stated that they were held at the Subcommittee's request, and Senator Eastland's testimony that the public hearings had been approved is clear and convincing and not seriously contradicted. Moreover, seven of the nine members of the Subcommittee were present at the opening of the public hearings and participated without objection. Such participation

not only indicates that there had, in fact, been prior approval for the hearings, but would in any case constitute substantial compliance with the rule requiring advance approval.

Nor were the rules violated by the procedure of the Subcommittee Chairman in issuing subpoenas on the basis of information provided by the chief counsel. The grant of the subpoena power to the Subcommittee by the Senate is based on Section 134(a) of the Legislative Reorganization Act of 1946, 2 U.S.C. 190(b) which grants power to standing committees to require the attendance of such witnesses as they deem advisable. To interpret that grant of authority to require, as appellant contends, that each subpoena issued must be authorized by a majority of the full subcommittee would be unduly restrictive of each Senate standing committee and would be in conflict with the interpretation of such authority by the Senate Subcommittee itself. Moreover, once again, the fact that a majority of the Subcommittee were participating in the hearings at the time appellant appeared and was questioned would satisfy any need for a determination that appellant's appearance was deemed advisable by such a majority of the Subcommittee.

ARGUMENT

I. THE EVIDENCE PRODUCED AT TRIAL ESTABLISHED THAT THE SUBJECT UNDER INQUIRY ALLEGED IN THE INDICTMENT WAS A SUBJECT UNDER INQUIRY AT THE TIME OF APPELLANT'S REFUSAL TO ANSWER.

The indictment alleged that on January 6, 1956, the date of appellant's appearance, the Subcommittee was conducting hearings on the subject of Communist activities in news media. The evidence produced at trial was sufficient to establish this allegation.

(A) The Precise Nature Of The Government's Evidentiary Burden.

As illustrated by the Supreme Court opinion in *Deutch v. United States*, 367 U.S. 456, and *Russell v. United States*, 369 U.S. 749, the Government's evidentiary burden in reference to the "subject under inquiry" may arise from either of two basically different issues. One of these issues arises when the witness challenges the pertinency of the questions at the time of his appearance before a Congressional committee. In such a case, the Government at trial must prove that the standards of *Watkins v. United States*, 354 U.S. 178, have been met in that the witness has been apprised of the subject under inquiry as a part of the required explanation of pertinency. The second issue arises from prosecution's duty at trial to prove as a matter of law that the questions which the witness refused to answer were pertinent to a subject then under investigation by the Congressional body which summoned him. *Deutch v. United States*, *supra*, 367 U.S. at 468; *Russell v. United States*, *supra*, 369 U.S. at 759.

Appellant, however, did not raise the issue of pertinency before the Subcommittee, and he could not, therefore, raise at trial the issue as to whether or not he was apprised of the subject under inquiry. In *Watkins v. United States*, *supra*, the Supreme Court stated that "[t]he final source of evidence as to the 'question under inquiry' is the Chairman's response when petitioner objected to the questions on the grounds of lack of pertinency" (*id.* at 214; emphasis added). The Court then held that "[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto" (*id.* at 214-215; emphasis added). The footnote to this sentence reads "Cf. *United States v. Kamin*, 136 F. Supp. 791,

800" (354 U.S. at 215, note 55). At page 800 of the *Kamin* opinion, then District Judge Aldrich emphasized the necessity of a specific objection on grounds of pertinency:

The defendant contends that it is not enough for a question to be pertinent—the witness must be informed of the subject matter, so that he may have a definite standard by which to determine whether he should answer. Because if he was not so informed he admittedly indicated no interest, and did not choose to supplement any deficiency in his knowledge by asking either the Chairman or his own counsel, I regard this contention as immaterial.

The requirement that the issue of pertinency be raised before the investigating committee was made absolutely clear by the holding in *Barenblatt v. United States*, *supra*, 360 U.S. at 123-124. Indeed, the Supreme Court stated that the issue is not even raised by a memorandum submitted by a witness to the committee saying that "I might wish to . . . challenge the pertinency of the question to the investigation," which memorandum quoted from an opinion of the Supreme Court, "language relating to a witness' right to be informed of the pertinency of questions asked him by an administrative agency." *Id.* at 123. The Supreme Court held that "[t]hese statements cannot, however, be accepted as the equivalent of a pertinency objection. At best, they constituted but a contemplated objection to questions still unasked, and buried as they were in the context of petitioner's general challenge to the power of the Subcommittee they can hardly be considered adequate, within the meaning of what was said in *Watkins* . . . to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection" (*id.* at 123-124). See also *McPhaul v. United States*, 364 U.S. 372, 380-381. And in *Deutch v. United States*, *supra*, 367 U.S. at 468, the Court found that "the petitioner was not made aware at the time he was questioned of the question then under inquiry nor of how the

questions which were asked related to such a subject." Nevertheless, the Court did not reverse the witness' conviction on this ground since (*id.* at 469):

[T]he thoughts which the petitioner voiced in refusing to answer the questions about other people can hardly be considered as the equivalent of an objection upon the grounds of pertinency. Although he did indicate doubt as to the importance of the questions, the petitioner's main concern was clearly his own conscientious unwillingness to act as an informer. It can hardly be considered, therefore, that the objections which the petitioner made at the time were "adequate, within the meaning of what was said in *Watkins, supra*, at 214-215, to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." *Barenblatt, supra*, at 124.

Appellant in the instant case, who appeared before the Subcommittee with counsel, did not make even the "contemplated" and "buried" objection to the two questions on the ground of pertinency which was made by the witness in *Barenblatt* or indicate any doubt as to the importance of these questions such as was stated by the witness in *Deutch*. Instead, appellant orally stated, after consulting with his counsel, that he objected to the question whether he was a Party member (Count 1) on the grounds of the First Amendment and the Subcommittee's lack of jurisdiction (see *supra*, pp. 8-9). The lengthy legal document which he read to the Subcommittee after being asked this question and which he also invoked after being asked whether he had talked with Matilda Landsman (Count 2) raises, and develops, only these same two grounds concerning the Subcommittee's power to investigate beliefs and associations. It does not even suggest that appellant was refusing to answer the questions because of their lack of pertinency. And appellant explicitly told the Subcommittee that this written statement contained the only grounds he was raising. (J.A. 83-84)

The only statement made by appellant at the hearings which could conceivably be construed to have raised the issue of pertinency came at the start of his appearance before the Subcommittee. He then gave as one of his three objections to being called by the Subcommittee (see *supra*, p. 8) that "[I fail to] see why I am involved in this hearing" since no prior witnesses had mentioned him. This objection, however, seems to claim that the Subcommittee did not have probable cause to subpoena him—a contention which appellant renews in this Court (see *infra*, pp. 30-35)—not that the questions asked lacked pertinency to the subject under inquiry. At the least, this objection does not have the clarity required by *Barenblatt* and *Deutch* (where the witness "indicate[d] doubt as to the importance of the questions" (367 U.S. at 469)) "to trigger what would have been the Subcommittee's reciprocal obligation had it been faced with a pertinency objection." *Barenblatt v. United States*, *supra*, 360 U.S. at 124. Moreover, appellant made this general objection prior to his being sworn and before any questions had been asked. The objection was not, and could not, have been directed to questions which he did not even know would be asked. When the questions on which Counts 1 and 2 are based were asked, appellant gave other, different grounds for refusing to answer them.

Appellant's omission of any objection as to the pertinency of the two questions which were the basis of his conviction is particularly significant since, in response to other questions asked by the Subcommittee—both before and after the two questions which underlie Counts 1 and 2—he specifically objected on the ground of pertinency. Twice in testifying before the Subcommittee in executive session (J.A. 46, 53) and twice in open session (J.A. 75, 86) he stated explicitly that he objected to a question because it was not pertinent. Thus, appellant knew how to object to the pertinency of particular questions but, apparently because he understood the per-

tinency of these two particular questions, deliberately did not raise this objection as to them.

Since appellant did not object at the hearing to the pertinency of the questions involved in this case, the issue at trial was not, as appellant contends, whether he "was aware at the time of his interrogation, or how the Government could possibly have proved beyond a reasonable doubt at the trial, that Communism in the news media was the delimited question of inquiry at the time of the hearing" (Br., p. 49), or whether he "clearly understood that there was a delimited inquiry being conducted by the Subcommittee" (Br., p. 50). The only question before this Court is whether or not the Government proved at trial that Communist activity in news media was a subject under inquiry when appellant refused to answer the questions which formed the basis of his indictment.⁴

(B) The Evidence Satisfied The Government's Evidentiary Burden.

The proof relating to the subject under inquiry introduced by the Government at trial⁵ consisted of Senate authorizing resolutions (Gov't Exs. 1, 2, and 7(a)), the printed transcript of the hearings conducted by the Subcommittee which foreshadowed the hearings at which appellant appeared (Gov't Ex. 5), and the transcripts of the hearings at which appellant actually appeared (Gov't

⁴ Appellant makes no clear contention, nor could he, that the two questions on which his conviction is based are not pertinent to the alleged subject under inquiry. This Court has already held that the questions are pertinent to the alleged subject matter, *Shelton v. United States*, *supra*, 280 F. 2d at 706. Moreover, the pertinency of the question of Count I relating to appellant's possible Communist Party membership, is conclusively established by *Barenblatt*, *supra*, 360 U.S. at 125; and the question charged in Count II, which was asked for the purpose of testing the appellant's credibility (J.A. 85) is pertinent on its face, *Sacher v. United States*, 102 U.S.App.D.C. 264, 252 F.2d 828 at 834, reversed on other grounds, 356 U.S. 576.

⁵ The Government stipulated that it would not offer any oral testimony on this issue (J.A. 11).

Exs. 8, 10). Each transcript, of course, set forth the remarks of the Chairman of the Subcommittee and of its members, and provided evidence of the nature of the proceedings themselves.

In other words, the Government's proof consisted of the "several indicia of the question under inquiry" set forth by the Supreme Court in *Watkins v. United States*, *supra*, 354 U.S. at 209, 214, and discussed above. As has been consistently held by each court that has reviewed such evidence relevant to the present appellant's appearance before the Subcommittee, the Government's proof clearly established that, as alleged in the indictment, a subject under inquiry at the time of appellant's appearance was Communist activities in news media.*

(1) The authorizing resolution. The Senate resolutions, under which the Subcommittee was acting, were entered as Government's Exhibits 1, 2, 7(a). These resolutions authorized a "complete and continuing study of:

(1) the administration, operation, and enforcement of the Internal Security Act of 1950;

(2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States;

(3) the extent, nature, and effects of subversive activities in the United States, its Territories and pos-

* The District Court at appellant's first trial found that the Subcommittee was "engaged in attempting to ascertain the extent and nature of Communist infiltration into the news dispensing agencies." (R. 224).

On the first appeal to this Court, it was held that the subject under inquiry was the efforts of the Communist Party, as a part of its program of infiltration and subversion, to use the press to influence public opinion, *Shelton v. United States*, 280 F.2d at 705.

The court below, in this proceeding, found that the Subcommittee was "engaged in attempting to ascertain at this inquiry the extent of Communist infiltration into the news media." (J.A. 239).

Whatever may be the differences in verbalization between these findings, each satisfied the allegations in the indictment.

sessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organization controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force or violence."

We do not contend, of course, that the resolutions, standing alone, establish that the alleged subject under inquiry was, in fact, under investigation at the time of appellant's refusal to answer. As this Court has observed in *Knowles v. United States*, 108 U.S.App.D.C. 148, 280 F.2d 696, "knowledge of the breadth of the resolution" only raises the inference that "perhaps [the Subcommittee] was pursuing them all." 280 F.2d at 700. But, while the resolutions do not establish a specific topic of inquiry, at the very least, and this is implicit in the holding of *Knowles*, the resolutions do provide a framework within which to judge the other "indicia" that are relevant, and provide a guide to the possible subjects under inquiry.⁷ At the very least, the resolutions evidence the Committee's general interest in Communism and Communist activities generally, including Communist subversion and infiltration.

(2) The statements of the Subcommittee Chairman and members and the nature of the proceedings. Turning, then, to the other indicia offered by the Government, which, for purposes of convenience, can be considered together, we submit that they clearly establish the specific segments of the Subcommittee's general interest being probed when appellant was questioned.

The nature of the proceedings and the relevant statements of the Subcommittee as established by the printed transcripts of the Subcommittee hearings (Gov't Exs. 5, 8, 10) are set forth in detail in the Statement, *supra*,

⁷ Of course, more than one subject may be pursued at any one time. *Knowles, supra*; cf. *Scull v. Virginia*, 359 U.S. 344.

pages 2-3, 5-7. These materials were summarized by the Court in its first opinion as follows:

Under [the authorizing resolutions] the Subcommittee had previously heard testimony from one Winston M. Burdett, a well-known journalist, foreign correspondent and newscaster, who had been a member of the Communist Party from 1937 to the early 1940's. Burdett cooperated fully with the Subcommittee and gave information including names of persons with whom he had worked; he did not refer to appellant. Later, the hearings involved in this case were called as part of the program "to pursue every lead which developed out of the Burdett testimony."

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At the opening of the public hearings in Washington on January 4, 1956, the Chairman pointed up the purpose of the inquiry, stating that the Subcommittee could not be unmindful . . . that among the persons involved in this investigation have been many who were, or are, members of the press, and that the international communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare and its institutions from inside by methods of penetration.⁹

Early in the hearings, Senator Hennings, a member of the Subcommittee, stated: that it should be generally known and understood that this is not an attack upon any known newspaper, upon any group of newspapers as such, but an effort on the part of this Committee to show such participation and such attempts as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or subvert the American press.¹⁰

The Subcommittee thus defined the general area of this series of hearings.

⁹ The Court's opinion cited the Hearings, Part 17, p. 1587, entered below as Government Exhibit 8.

⁹ The Court citing Government Exhibit 8 at 1587.

¹⁰ The Court citing Government Exhibit 8 at page 1588.

Immediately before the appellant was called to the stand at the January 6th session, Senator Hennings also commented in part: I think that no one will quarrel with, nor take issue with the fact, that this Committee has the right to inquire into all evidence, or, indeed, all consummation of effort of the Communist Party to infiltrate newspapers or other media of communication. (280 F.2d at 703).¹¹

We submit that any interpretation of this evidence must result in the finding, made by this Court, that "the broad subject matter of Communist Party infiltration and subversion, the narrower subject of its efforts to influence American public opinion and the specific effort to use the press to implement these objectives were spelled out with utmost clarity not only in the remarks of the Subcommittee members, but also in the context of the hearings." 280 F.2d at 705. And that "the interrogations of [witnesses called at these hearings] was directed at Communist activities in the press and communications field generally."

(C) The Appellant Was Fully Aware Of The Subject Under Inquiry.

As already discussed, it is our view that the issue of whether or not appellant was apprised of the subject under inquiry of his appearance before the Subcommittee is not an issue in this case. Apparently conceding that this is so, the appellant does not, either in framing the questions presented or in titling his arguments, raise the issue. However, in presenting his arguments, appellant confuses the issues by complaining that "a defined subject of inquiry could not be discerned at the hearing," (Br. 44) or that "it is difficult to understand how appellant could possibly have been aware at the time of his interrogation, . . . [of the question under inquiry]" (Br. 49), or that "there is no basis on which one could find that a mere witness, such as appellant, clearly understood

¹¹ Hearings, Part 17, Gov't Ex. 8, p. 1718.

that there *was* a delimited inquiry being conducted . . .” (Br. 50). However, even if it were necessary to satisfy the confused standards advanced by appellant as to the Government’s evidentiary burden at trial, such standards were satisfied completely for there can be little doubt that appellant was aware of the subject under inquiry. At the beginning of the hearings on January 4, 1956, the Chairman clearly stated that the purpose of the hearings was to investigate Communist activity in the news media field (see *supra*, p. 5). While appellant did not appear at the hearings until January 6, he showed his awareness of the Chairman’s opening statement by saying at the hearings that he did not “see why I am involved in this hearing, which the Chairman said on Wednesday stems from the Burdett testimony” (see *supra*, p. 8). He also showed familiarity with the testimony of Winston Burdett and Clayton Knowles—which concerned Communist infiltration of the communications field (see *supra*, pp. 2-3, 6)—by saying that “[t]here was no reference to me in the Burdett testimony nor in the testimony of Clayton Knowles.”

Moreover, appellant was presumably in the room at the beginning of the Subcommittee’s proceedings on January 6, 1956, the day he was subpoenaed to appear, and did appear only a few moments later as the first witness of the day. Before petitioner testified on January 6, the chairman stated that the hearings were directed to investigating infiltration of persons identified as Communists into news agencies. As already noted, Senator Hennings said (Hearings, Part 17, Gov’t Ex. 8, p. 1716) :

I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

And the prepared statement which appellant read as his reason for refusing to answer the questions underlying his conviction demonstrates clearly that he knew that the

Subcommittee's investigation was into Communist activity in the newspaper field. For almost the entire statement is devoted to the claim that the Subcommittee's investigation of the newspaper field violated freedom of the press guaranteed by the First Amendment. (Gov't Ex. 8, J.A. 77-83).

Appellant, however, contends that the subject under inquiry could not possibly have been made clear to him since different subjects were stated by the Subcommittee at the hearings, by the prosecution and by Subcommittee counsel at the trial. Appellant contends (Br. 45) that four different subjects have been suggested: (1) Communism generally; (2) Communist infiltration of news media; (3) Communism in the New York Typographical Union or in the New York area; and (4) Communism on the New York Times. This contention is without merit.

All these subject except possibly Communism in the New York area are on their face fully and directly consistent with the alleged subject, Communist activity in news media, which, as we have shown (pp. 27-28), was the subject clearly described to appellant at the hearing. That subject was obviously a part of Communism in the United States generally, which is the major part of the investigatory authority given the Subcommittee by the Senate. S. Res. 366, 81st Cong., 2d Sess, Gov't Ex. 1. On the other hand, Communism in the New York Typographical Union and on the New York Times are a part of the subject of Communism in the news media. Thus, all these subjects were being investigated at one and the same time.

As to the subject of Communism in New York, this too was a subject under inquiry. For, while the subject was Communist infiltration of news media, the hearing was in fact limited to such Communist activity in the New York area. This can be readily seen from the witnesses who testified. Thus, the Subcommittee while investigating Communism in news media, was also investigating Communism in New York. Moreover, the

only references to this subject as the subject under inquiry were the heading to the transcript of the hearings (Gov't Ex. 8) and testimony of Subcommittee counsel at appellant's first trial (R. 138-139). Thus, even if we assume *arguendo* that appellant would have been confused if he had been told when he testified that the Subcommittee was investigating both Communism in news media and in New York, he was not so told.¹²

The "inconsistency" claimed for the statements of the Subcommittee counsel is answered by the quoted statements themselves. Counsel's position seems to be that, when the Subcommittee sits, it sits with its full authority and the scope of the Subcommittee's inquiry is as broad as its authority, and that within that authority the Subcommittee at a particular time and in asking a particular question may be investigating one or more specific segments of the overall scope of its inquiry.¹³ It is difficult

¹² In addition, little importance can be attached to the headings subsequently placed on particular hearings. These headings are applied on the basis of editorial convenience and were never intended to describe with specificity all subjects investigated.

¹³ Appellant seems to argue that if more than one subject may be being pursued at a particular hearing, that there can be no specific subject under inquiry. Such a proposition defies logic and experience. Even under the stringent rules relating to judicial trial, it is obvious that a specific question asked of a witness may relate to a number of issues in controversy, and, of course, to the ultimate issue.

Moreover, appellant's position would seriously limit the scope of Congressional investigations. As has been stated by this Court in *Townsend v. United States*, 68 U.S.App.D.C. 223, 95 F.2d 352, 361:

"A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional power of Congress, *McGrain v. Dougherty*, 273 U.S. 135. A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which might arise thereunder, and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad."

And, as we have already noted, p. 24, note 7, *supra*, both this Court and the Supreme Court have recognized that, at any particular time, more than one specific subject may be being pursued.

to argue with the statement of Subcommittee counsel that there is: "no discrepancy between saying that [the Subcommittee] had under investigation at this time the whole range of [its] authority and this had not been narrowed and limited, and also stating that at this particular time [the Subcommittee] had under inquiry some particular segment of that authority, because I think the former statement necessarily embraces the latter" (J.A. 118). The supposed inconsistency in the prosecutor's view as discussed below, *infra*, pages 50 to 52, was also a reflection of this view.

In any event, the only subject under inquiry described to appellant was that charged in the indictment—Communist activity in news media. That this is the case is established by the best evidence—the transcripts of the Subcommittee hearings.¹⁴

We submit that the description of other subjects under inquiry, occurring long after the time appellant refused to answer the questions (particularly when these subjects were fully consistent with the subject that was clearly described to him) cannot possibly mean that appellant was not aware of the subject under inquiry at the time of his questioning.

II. SUBPOENAING OF APPELLANT TO TESTIFY BEFORE THE SUBCOMMITTEE DID NOT VIOLATE THE FOURTH AMENDMENT.

Appellant argues that the Subcommittee's use of compulsory process violated his rights under the Fourth Amendment, a contention which this Court refused to validate upon the first appeal. The Court's refusal to so hold was correct, as appellant's argument is without merit. Not only is the Fourth Amendment totally inapplicable to subpoenas to testify, but the standards that

¹⁴ At trial, appellant conceded that such documentary evidence was indeed the only evidence by conceding that oral testimony on this issue would be inappropriate (J.A. 11).

would be imposed if it were assumed applicable were fully satisfied in the present case.

(A) The Fourth Amendment Does Not Apply To Subpoenas To Testify.

The Fourth Amendment, of course, protects witnesses who appear before Congressional committees. But we submit that the Fourth Amendment, unlike the First and Fifth, pertains only to subpoenas *duces tecum*. The language of the Amendment itself makes clear that it was intended to protect "persons, houses, papers, and effects" from improper search or seizure and not, like the Fifth Amendment, to protect witnesses from being forced to testify.

No Court has ever held that the Fourth Amendment is relevant to subpoenas requiring witnesses to appear and testify. In *Boyd v. United States*, 116 U.S. 616, and other cases cited by appellant (Br. 25), the Supreme Court decided that the Fourth Amendment applies to subpoenas *duces tecum*, as well as to forcible searches and seizures, because the "compulsory production of a man's private papers" "accomplishes the substantial objects of [the] acts" of "forcible entry into a man's house and searching amongst his papers." 116 U.S. at 622. In contrast, the requirement that a person appear briefly before a Congressional committee does not accomplish the substantial objects—or interfere with his rights to the same extent—as seizure of his person by arrest.

Appellant's principal authority (Br. 27-28) for the proposition that the Fourth Amendment applies to subpoenas to testify, other than the cases which concern subpoenas *duces tecum*, is a general statement in the dissenting opinion of Mr. Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 478:

The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right,

every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

This extremely broad statement has never been accepted by a majority of the Supreme Court. In addition, it was directed at physical invasions of privacy or their equivalent such as wiretapping—which was the intrusion involved in that case. For the statement is based on a synopsis and citation of cases (see 277 U.S. at 477-478, and notes 4-10) involving physical invasion of privacy (e.g., *Weeks v. United States*, 232 U.S. 383), or improper use of subpoenas *duces tecum* which this Court has held have substantially the same effect as a physical invasion (*Boyd v. United States*, *supra*).¹⁵

The only decisions (which we or appellant have discovered) indicating that probable cause is required in order to subpoena a person to testify are *Barenblatt v. United States*, 360 U.S. 109, *Braden v. United States*, 365 U.S. 431, and *Wilkinson v. United States*, 365 U.S. 399. In all of these cases, however, the Supreme Court discussed probable cause in terms of the First Amendment as relating to the question of a valid legislative purpose, not in terms of the Fourth Amendment. In the *Barenblatt* case, the Court stated (360 U.S. at 134): "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee." This statement suggests that if a witness was subpoenaed as the result

¹⁵ Appellant quotes (Br. 26) from *Sinclair v. United States*, 279 U.S. 263, 292, that persons are "exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures * * *." The rest of the sentence, however, was "in respect of their personal and private affairs." The issue was thus whether the committee had a valid legislative purpose, not probable cause—i.e., the issue was whether Congress has power to question persons as to non-legislative matters, not whether the Fourth Amendment forbids inquiry whether for a legislative purpose or not.

of "indiscriminate dragnet procedures, lacking in probable cause" he might be freed from having to answer the questions. But the statement is clearly part of a discussion of a witness' rights under the First Amendment. Similarly, in *Braden v. United States*, 365 U.S. at 435, the Court stated that "[t]he subcommittee had reason to believe that the petitioner was a member of the Communist Party, and that he had been actively engaged in propaganda efforts." At the end of this paragraph, the opinion said that "[u]pon the reasoning and authority of *Barenblatt* * * * we hold that the judgment is not to be set aside on First Amendment grounds" (*ibid.*). And in *Wilkinson*, in discussing whether the committee had a valid legislative purpose, the Court similarly said (365 U.S. at 412): "It is to be emphasized that the petitioner was not summoned to appear as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that he possessed information which might be helpful to the subcommittee."¹⁶

¹⁶ We note in passing that even if we assume, *arguendo*, that the Fourth Amendment did apply to Congressional subpoenas *ad testificandum*, there would be a very real question as to whether or not appellant could raise this issue at trial. The Supreme Court has repeatedly held that a witness who refused to produce documents or testify before a Congressional committee must present his legal objections before the committee at the time of his testimony. If he fails to do so, it is established that the objections cannot be raised for the first time at his trial for contempt. *Hale v. Henkel*, 201 U.S. 43; *United States v. Bryan*, 339 U.S. 323; *United States v. Fleischman*, 339 U.S. 349. This principle has been applied to constitutional claims in a case where a witness refused to answer questions propounded by a grand jury, *Ullman v. United States*, 350 U.S. 422, 439, note 15. And in *Barenblatt v. United States*, 360 U.S. at 125-124, and *Deutch v. United States*, 367 U.S. 456-469, the Court held that anticipatory objections and suggestions of doubt are not sufficient to raise an objection before a Congressional committee.

Appellant at no time objected to the Subcommittee that his questioning violated the Fourth Amendment. Although appellant submitted a lengthy legal document to the Subcommittee, his sole contentions were that the Subcommittee was violating his rights under the First Amendment, and that they lacked jurisdiction to investigate beliefs and associations. While he did state that he did

**(B) If The Fourth Amendment Does Apply, It Was
Not Violated In This Case.**

If the Fourth Amendment does apply to subpoenas to testify, we submit that it is less strict with regard to Congressional investigations, which merely seek testimony, than for arrests or searches and seizures. In *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, the Supreme Court held that the test to be applied under the Fourth Amendment when an administrative agency issues subpoenas *duces tecum*¹⁷ is markedly different from the standard applicable to warrants (*id.* at 208-209):

It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations, but also frequently in respect to general or statistical investigations authorized by Congress. The requirement of "probable cause, supported by oath or affirmation," literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.

As the enumerated standards are those that must be satisfied by a subpoena *duces tecum* issued by an administrative agency exercising powers granted to it by Congress, *a fortiori* they are the most that can be required

not understand why the Subcommittee had subpoenaed him (J.A. 73) and that he was subpoenaed by accident (J.A. 79), this was part of his contention that the Subcommittee was violating his First Amendment rights. Certainly, these objections were not clear enough to raise a Fourth Amendment claim under the test of specificity required in *Barenblatt* and *Deutch*, both *supra*.

¹⁷ As we have indicated (pp. 31-32), the Fourth Amendment does apply to subpoenas *duces tecum* as contrasted with subpoenas to testify.

of Congress itself, when it issues not a subpoena *duces tecum*, but a subpoena to testify. There is no reason to apply a stricter standard to subpoenas to testify than to subpoenas *duces tecum* or to Congressional committees than to executive agencies.¹⁸

Applying these standards to this case, the Subcommittee clearly had authority from Congress to investigate Communist activities in news media (S. Res. 366, 81st Cong., 2d Sess.; see *supra*, pp. 23-24), and such an investigation is within the power of Congress to conduct (*Barenblatt v. United States*, 360 U.S. 109 at 125-134; see *infra*, pp. 39-40). And as noted elsewhere, appellant makes no claim, nor could he, that the questions were not pertinent to the subject under inquiry (Note 24, page 22). Thus, even if the Fourth Amendment were held to apply to subpoenas to testify, as contrasted with subpoenas *duces tecum*, the subpoenaing of appellant was fully consistent with the Fourth Amendment.¹⁹

¹⁸ Indeed, the Supreme Court recognized that, in setting forth the standards, they were deciding issues which could, perhaps, affect Congressional power of investigation. *Oklahoma Press Publishing Co. v. Walling*, *supra*, 327 U.S. at 201.

¹⁹ Appellant also contends (Note 7, p. 30) that if the Chairman of the Subcommittee, in issuing the subpoenas, relied on the advice and conclusions of the chief counsel, such reliance by the issuing officer constitutes a violation of the Fourth Amendment.

But, again, the Fourth Amendment does not apply to subpoenas to testify, and the requirements of subpoenas *duces tecum* cannot be engrafted to them. Moreover, even if the Fourth Amendment were held to apply to Congressional subpoenas, we have shown that the standards to be applied are those relating to the issuance of subpoenas by administrators. The subpoena power granted to an administrator may be delegated, even to the extent of delegating the power to issue subpoenas *duces tecum*. This contention is also answered by the application of the standards to be applied to the issuance of subpoenas by administrative agencies. See the opinion of Justice Jackson, concurring in *Flemming v. Mohawk Wrecking and Lumber Company*, 331 U.S. 111 at 123, and the dissenting opinion of Justice Douglas in *Cudahy Packing Co., Ltd. v. Holland*, 315 U.S. 357 at 368.

Though these cases also speak of judicial review of the subpoenas, they are referring, of course, to the court's duty to order

(C) Appellant Was Not Denied Due Process Because He Was Not Informed At The Hearing Of The Information Relating To The Subcommittee's Decision To Call Him.

Since the Fourth Amendment does not apply to Congressional subpoenas to testify, the Subcommittee's alleged failure to explain to appellant why he was called was not a denial of due process. Nor would our position be any different if the Fourth Amendment were held applicable. As we have shown, the test to be applied to the Subcommittee's compulsory process is whether an investigation is within the Subcommittee's authority, whether the investigation is within the power of Congress to conduct, and whether the questions are relevant to the inquiry. All the information needed for appellant to judge whether or not these standards were complied with was made available to appellant, or was his for the asking.

The Subcommittee's authorizing resolutions spelling out the scope of its authority are matters of public record. As discussed above, and held by this Court, 280 F. 2d at 706, appellant evidenced no interest in the subject under inquiry, but, in any event, the subject under inquiry was clearly discernible from the statements of the Chairman of the Subcommittee and Senator Hennings, one of the members, and transcripts of the proceedings themselves. Thus, appellant had available the necessary information to judge whether or not the inquiry was within the Subcommittee and Congressional authority. He,

the enforcement of the subpoenas if the standards set forth in the *Oklahoma Press Publishing Co.* case above are met, and these standards are applied to a Congressional subpoena when resort is had to 2 U.S.C. 192 to insure Congress' investigative processes from contempt. If administrators may delegate the authority granted to them to issue subpoenas *duces tecum*, *a fortiori* the Subcommittee chairman was entitled to rely on the statements of his chief counsel as to the materiality and importance of the testimony expected from the witnesses. Any other holding could only result in requiring the Senator who issues subpoenas to be his own investigator.

in fact, made such a determination, and objected to the Subcommittee's inquiry on the grounds that the investigation, being an investigation of the press, violated the First Amendment and exceeded the Subcommittee's authority. The knowledge of the subject under inquiry, and the corresponding accessibility to such information, also provided appellant with proper basis for determining whether or not the questions were relevant to the Subcommittee's inquiry.

A witness' protection when subpoenaed to testify before a Congressional committee lies not in being able to challenge the information underlying a Congressional subpoena. It lies in the fact that his testimony can only be compelled by a properly authorized committee conducting an inquiry falling within the investigatory powers of the Congress, and that he is only compelled to answer relevant questions. As observed in *Watkins v. United States*, 354 U.S. at 215, such protection should not unduly hamper the Congress in obtaining the information it needs for the fulfillment of its legislative role. However, to permit a witness to challenge Congressional subpoenas in the manner suggested by appellant would be to place in the hands of the courts the power to evaluate and control Congressional purpose and intent in calling each particular witness and would be in direct opposition to the holdings of the Supreme Court. In *Wilkinson v. United States*, *supra*, the Court stated, 365 U.S. at 412:

Moreover, it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner. As was said in *Watkins*, *supra*, "a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." 354 U.S., at 200. See also *Barenblatt*, *supra*, 360 U.S., at 132.

To permit a Congressional committee to compel the attendance and testimony of only those witnesses which a court had judicially determined were subpoenaed for "probable cause" would not only seriously impair the effective discharge of the Congressional duties of investigation and legislation, it would raise very serious questions as to the separation of powers.

It must be emphasized that, as we have seen, the witness is not without ample protection of his rights even if he is required to answer a Congressional subpoena without an explanation as to why in his particular case he has been called. And, as stated by the Supreme Court in *Blair v. United States*, 250 U.S. 273, concerning the citizen's duty to respond to subpoenas before a court or a grand jury, and completely applicable here:²⁰

"... it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned . . . [T]he personal sacrifice involved is a part of the necessary contribution of the individual citizen to the welfare of the public."

In brief, we submit that there is a complete lack of authority for appellant's contention, that the already established limitations upon Congressional committees provide ample protection for the private affairs of citizens subpoenaed by such committees, and that, therefore, appellant's argument seeks an unwarranted and unnecessary judicial rule. Finally, we submit that, as observed by the court below at appellant's first trial (R. 222-223):

²⁰ A witness called before a court or a grand jury is called to provide testimony as to a particular case or controversy which, aside from society's interest in punishing criminal actions, affects a limited number of people. A witness called before a Congressional committee is called to provide information so that Congress may adequately discharge its functions; therefore, a request to participate is charged with the public interest, and may, in a very real sense, affect every one of us.

"The doctrine of separation of powers and a rightful regard for the authority of the legislative branch of the Government, we believe, refutes a judicial evaluation of those matters which are within the discretion of the Congress, which alone is responsible for the exercise of the authority from which the disputed power arises."

III. THE SUBCOMMITTEE'S INVESTIGATION OF COMMUNIST ACTIVITIES IN NEWS MEDIA DID NOT VIOLATE THE FIRST AMENDMENT.

Appellant contends (Br. 51-55) that the Subcommittee's investigation of the press violated the First Amendment. The subject under inquiry when appellant testified before the Subcommittee was Communist activities in news media (see *supra*, pp. 5-8, 22-26). The Supreme Court has made clear that, because Congress can legislate concerning Communist activities, a Congressional investigation of Communist Activity, even in a field protected by the First Amendment, is a constitutionally permissible pursuit. In *Barenblatt v. United States*, *supra*, 360 U.S. at 125-134, the Court held that Congress could legitimately investigate the Communist infiltration of education. A year later, in *Braden v. United States*, 365 U.S. 431, the Court, in upholding a Congressional investigation of Communist propaganda activities, stated that (*id.* at 435):

• • • *Barenblatt* did not confine Congressional committee investigation to overt criminal activity, nor did that case determine that Congress can only investigate the Communist Party itself. Rather, the decision upheld an investigation of Communist activity in education. Education, too, is legitimate and protected activity. Communist infiltration and propaganda in a given area of the country • • • are surely as much within its pervasive authority as Communist activity in educational institutions. • • • Information as to the extent to which the Communist Party was utilizing legitimate organizations and causes in its propaganda efforts • • • was

surely not constitutionally beyond the reach of the subcommittee's inquiry.

And in *Wilkinson v. United States*, 365 U.S. 399, 413-414, the Court similarly upheld Congressional investigation of Communist propaganda activities, stating that this issue was "thoroughly canvassed by us in *Barenblatt*." Just as Congress can investigate Communist activities in education and propaganda, fields equally protected by the First Amendment, so Congress and therefore this Subcommittee could investigate Communist activities in the news media.

A. The Subcommittee was Investigating Communist Activities in News Media, Not News Media in Themselves.

Appellant contends (Br. 52-53), however, that the Subcommittee was in fact investigating the press (or the New York Times), not Communist infiltration of news media. But this is squarely contradicted by the record and by the findings of the district court (J.A. 238-239, 241).²¹ The Chairman and another member of the Subcommittee (Senator Hennings) explicitly stated at the hearings (*supra*, pp. 5-7) that Communist infiltration of the press, not the press itself, was under investigation. All the questions asked appellant were either directly related to Communist activities or were preliminary inquiries intended to lead up to such questions. After appellant had testified, the Subcommittee asked other newspaper employees similar questions concerning Party activities (see, *e.g.*, Hearings, Part 17, 1739-1743, 1761-1763, 1769-1774, 1777-1784, 1785-1787, 1790-1791). In addition, the record shows that the questions were not a mere fishing expedition, as the Sub-

²¹ At the first trial the district court, upon the same evidence, likewise found that appellant's contention of a "non-legislative purpose" was wholly insufficient (R. 225). On appeal from the first conviction, this Court said that "this inquiry was in no sense an investigation into the press as such. . . ." (R. 242).

committee had information that Communists had infiltrated into the press (see *supra*, pp. 2-3, 6,9), and this information was confirmed by testimony taken the same day as appellant appeared (Hearings, Part 17, pp. 1732, 1739-1740, 1777, 1791).

B. There is no Evidence in the Record to Suggest that Appellant Was Subpoenaed Not in Pursuit of a Valid Legislative Purpose.

1. In *Barenblatt v. United States*, *supra*, 360 U.S. at 126, the Supreme Court held that "where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Addressing itself to the balancing process, the Court found that the investigation involved was related to a valid legislative purpose, since "Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof" (*id.* at 127). The entire remainder of the Court's discussion of the First Amendment is a point-by-point refutation of defendant's attacks on the validity of that legislative purpose: "investigatory power in this domain is not to be denied Congress solely because the field of education is involved" (*id.* at 129): "nor can we accept the further contention that this investigation should not be deemed to have been in furtherance of a legislative purpose because the true objective of the Committee and of the Congress was purely 'exposure'" (*id.* at 132). The established legislative purpose, synonymous in the Court's opinion with "the governmental interests here at stake", also survived a last volley of objections, the Court stating (*id.* at 134):

Finally, the record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state. There is no indication in this record that the Subcommittee was

attempting to pillory witnesses. *Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee.* And the relevancy of the questions put to him by the Subcommittee is not open to doubt. (Emphasis added).

To the same effect, but in more abbreviated manner, is the language in *Wilkinson v. United States*, 365 U.S. 399, at 412.

We have already shown (*supra*, pp. 31-33) that the above reference to "probable cause" in *Barenblatt* does not engraft the Fourth Amendment's protections onto the procedures for calling a witness to testify before a Congressional Committee. Nor is "probable cause"—or even the whole phrase from which appellant plucks it—part of the government's affirmative showing of legislative purpose. Under the *Barenblatt* scheme, that affirmative burden is fully sustained by a showing, such as was made here (*supra*, pp. 40-41), that the particular investigation in issue was in aid of Congress' indisputable power to legislate in the field of Communist activity in this country. "Probable cause," then, is more properly verbalized as "indiscriminate dragnet procedures lacking in probable cause", and thus verbalized, appears correctly—along with "attempting to pillory witnesses"—as a factor, the presence of which the defendant-witness must show in order to negate the validity of the legislative purpose, and the absence of which leaves unimpaired the validity of the legislative purpose. Thus, in approaching the balancing process, the court first looks for a legislative purpose and, having found a legislative purpose which is valid because the inquiry is in aid of a Congressional power to legislate, predicates that legislative purpose as sufficient to defeat a First Amendment claim in bar of the inquiry, absent any showing that the assertions of "dragnet" or "pillory", which under *Barenblatt* might sometimes rebut the validity of the legislative purpose, are supported by evidence in the record.

That the validity of the legislative purpose should prevail, absent not only an assertion but a showing to the contrary, is consonant with, and actually derivative from (*Watkins v. United States*, 354 U.S. 178, 215), the presumption of validity due from the judiciary to a coordinate branch of the government and the corollary doctrine of separation of powers. Upon this basis, the *Barenblatt* Court refused to find the legislative purpose vitiated by a claim that the true objective of the Committee was purely "exposure," citing *McCray v. United States*, 195 U.S. 27, 55, to the effect that:

It is, of course, true that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power.

In short, we believe that the decision whether to subpoena a witness is mainly for the legislative body and, unless a particular case is part of an indiscriminate dragnet, impervious to judicial control. To superimpose on a trial for contempt a full-scale trial of a committee's judgment would be an invasion of the prerogative of the legislature and a serious interference with Congressional investigations.

This is the approach taken by this Court in the first *Shelton* case and, indeed, in whichever of the contempt of Congress cases raised the issue of "probable cause". The Court resolved thus the identical claim that appellant makes here:

Finally, appellant challenges the Subcommittee's subpoena power. The essence of this attack is that the subpoena under which appellant testified was invalid because the Committee had no reason to call appellant. This argument by its terms rests on the

theory that in order to call appellant the Committee must show it had reason to believe he was or had been affiliated with or had information about Communists. (*Shelton v. United States*, 280 F.2d 701, 707, 108 U.S. App. D.C. 153).

The Court dismissed outright the part of appellant's theory which would have the Committee bound to a showing of its belief of the witness's Communist affiliations. Concerning the necessity for a Committee's belief that the witness had information about the subject under inquiry, the Court cited *Barenblatt* and adopted its approach that an absence of evidence of pillory or dragnet was all that is required to deter further judicial scrutiny of the Committee's use of compulsory process. The Court reasoned thus:

A careful review of this record satisfies us that the authority of the Subcommittee to conduct the hearings is plain, that there was full awareness on the part of the appellant that the subject matter was the possible infiltration of Communists into the radio, TV, and the press, including his own paper and that the questions were plainly pertinent to the topic. There is not the slightest indication in this record of an effort or desire or a tendency to pillory the appellant or other newspapermen or to call them indiscriminately without reason. After the important revelations of Winston M. Burdett, it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees. (*Shelton v. United States, supra*, at 708).

2. We submit that this Court is here bound by its prior decision in the *Shelton* case. When a defendant makes the allegation that the Committee's subpoena power has been abused, the court is called upon to observe whether or not there has been such abuse of the power as to vitiate the legislative purpose for which it was presumptively exercised. There is no more showing on this record than there was at the prior trial of the Subcommittee's abuse of its subpoena power with respect to the

calling of appellant. Appellant asserts that his claim of "accident" advanced before the Subcommittee, and his elicitation on cross-examination of Subcommittee counsel that the Subcommittee had specific information from an informant concerning a Shelton, burden the government with showing, in order to sustain his conviction for contempt, that the Subcommittee had in its possession information which would, given the circumstances of a criminal offense, justify his arrest. The burden is not the government's. The burden is appellant's: to show, upon a record which clearly reveals that the Subcommittee was investigating Communist activities in news media, an area in which the Congress could legislate and concerning which the Subcommittee had significant leads from Winston Burdett as well as information of alleged Communist infiltration of the editorial and mechanical sides of the New York Times (J.A. 32-33), why the Subcommittee could not properly subpoena an employee of the New York Times' editorial department. Appellant has not made a showing of dragnet, to the end of rebutting the validity of the legislative purpose, because he has not shown that the legislative purpose was not to be served by the compulsion of his appearance.

3. There was, although it need not be relied on, an affirmative showing by the government at trial, aided by appellant's cross-examination, that the Subcommittee had specific information concerning appellant which led it to the reasonable belief that his testimony could be of value to its investigation. We shall first consider in some detail the nature of the test which, we submit, might be applied in judging a Congressional committee's basis for calling a witness, if that basis is to be open to further judicial review.

Here, the Subcommittee had heard testimony from a newspaperman and broadcaster, who was a former member of the Communist Party, of Communist efforts, in part successful, to infiltrate and influence the newspaper field (see *supra*, pp. 2-3). Subsequently, as the chief counsel of the Subcommittee testified at appellant's trial,

the Subcommittee received information that a man named Shelton, who was employed in the news side of the New York Times, was connected with a Communist group on the Times and should be in a position to give the committee information about the activities of that group (J.A. 154). This information was sent to the Subcommittee in a letter (J.A. 31, 121). Although the letter was signed with a pseudonym, "Finbar", the identity of the signer was known to the former associate counsel of the Subcommittee, Robert Morris (J.A. 154-155). The same person had sent other letters to the Subcommittee, using the same pseudonym, and the information contained in these letters had been checked and found to be correct (J.A. 155).

Although the Subcommittee was still unaware of Mr. Shelton's first name, a subpoena was issued, addressed to "Willard Shelton" at the New York Times (J.A. 36-37). The Subcommittee employee who went to New York to serve the subpoena discovered that there was no Willard Shelton on the New York Times (J.A. 155). The employee was told that a Robert Shelton was employed by the Times and that he was the only Shelton on the editorial or news side (J.A. 41, 155). The chief counsel concluded that Robert Shelton must be the Shelton described by the informant without a first name (J.A. 41). Another subpoena, addressed to "Robert Shelton", was issued a few days later, and served on appellant by a Deputy United States Marshal (J.A. 41-42).

At the time the subpoena was issued and before the date of appellant's first appearance before the Subcommittee, the Subcommittee counsel had:

• • • leads respecting the existence of several individuals bearing the name Shelton as the surname, and we wanted to clear up the question of identity as to whether this man was any of those individuals, whether there was any continuity of Communist connection that could be established. There was also the question as to whether this was in fact as had been reported to us a man who could give useful information (J.A. 157).

Therefore, the Subcommittee desired to question appellant concerning whether he was the Shelton mentioned in the Subcommittee's files (J.A. 157).

When appellant appeared at the executive session on December 7, 1955, he was advised by Subcommittee counsel that the purpose of his appearance was to clarify the question of identity (J.A. 46). Appellant declined to cooperate with the Subcommittee by refusing to answer numerous questions (J.A. 47-53). The Subcommittee subsequently contacted appellant's counsel and told him to have appellant appear at hearings beginning on January 6, 1956 to answer the questions on which he was convicted. Thus, the subpoena—on which the mistake was initially made as to Mr. Shelton's first name—was not the basis for appellant's appearance at either the executive or the open hearing. There was no mistake as to the direction to appellant to appear at the hearings which resulted in his contempt; the Subcommittee contacted appellant's counsel and asked appellant to appear.

We submit that at the time appellant appeared at the open hearings the Subcommittee had reasonable ground for believing that appellant had information that would be of considerable value. The Subcommittee had been informed that there was Communist infiltration of the press, and also had specific information from a reliable informant that a Shelton on the editorial or news side of the New York Times was connected with the Communist Party. Since appellant was the only Shelton fitting this description, the Subcommittee had reason to believe that appellant could testify concerning Party activities in the newspaper field.

Appellant suggests, however, that the government cannot rely on information provided by the informant because it refused at trial to produce the anonymous letter which conveyed this information to the Subcommittee.²²

²² This refusal was based on the Government's position that, primarily, production of the letter was not required by any of the rules of evidence (J.A. 122)—a position taken at the first trial when the letter was in existence—and secondarily, that the letter

This might be true if "probable cause" was an element of the criminal offense which the government was required to prove. This, however, is clearly not the case. Instead, the *Barenblatt* case shows that "probable cause" is one of several considerations in determining whether First Amendment rights have been violated. Therefore, we submit that, when the Court in *Barenblatt* and *Wilkinson* referred to "dragnet procedures" and "probable cause," it did not mean to suggest that the sufficiency of the information or reasons which cause a committee to call a witness should be subject to plenary judicial review. Rather, we believe, the Court intended at most to require only that Congressional committees present material showing the basis of their decision to subpoena the witness. See *Sacher v. United States*, 240 F.2d 46, 50, 99 U.S. App. D.C. 360, vacated and remanded on other grounds, 354 U.S. 930. Here the Subcommittee's counsel described the information possessed by the Subcommittee as to appellant's alleged Communist affiliation. This evidence is sufficient for a court to decide whether the information described by the Subcommittee constitutes "probable cause", i.e., that it was reasonable for the Subcommittee to believe that it could obtain pertinent testimony from the witness.

Appellant also quotes (Br. p. 9) a statement made by the Subcommittee counsel to appellant at the executive session that appellant was not charged with being a Communist and that counsel was greatly surprised when appellant refused to answer questions (J.A. 50-51). Subcommittee counsel, however, fully explained this statement at appellant's trial on the ground that appellant had earlier in the executive session strongly indicated to the Subcommittee both by his answers to questions and his demeanor that he was not the Shelton whom the Subcommittee was seeking to question and that therefore the subpoena was wrongly issued (J.A. 158). Certainly, the statement of counsel at the executive session was not suf-

had been destroyed in the normal course of the Subcommittee's business (J.A. 123-124), under the circumstances described *supra*, at p. 3.

ficient to overcome all the other evidence in the trial record that the Subcommittee had reasonable ground to question appellant about Communist infiltration into news media when he appeared at the public hearings after refusing to testify in executive session.

Even if we assume, however, that the Subcommittee did not have reasonable ground to believe that appellant was connected with the Party, the Subcommittee could be absolutely certain that appellant had valuable information to contribute. This information was whether appellant was in fact the Shelton described in the information previously given to the Subcommittee. If he was, the meaning of the information already in the files would be clarified and there would be no need to look for another Shelton who was the subject of this information. At the least, the Subcommittee would have information that one Party affiliate was employed, perhaps in a significant capacity, on an important newspaper. In addition, appellant could then be thought to have information concerning Communist activity in the newspaper field. If appellant testified that he was not the Shelton described in the Subcommittee's files, this would indicate to the Subcommittee that it would have to look further to find the subject of its information. In short, we submit that a Congressional committee can call a witness for purposes of identification where it has information concerning one of a narrowly defined group of persons. Certainly, it was not likely that there would be a large number of Sheltons on the New York Times.

Clearly, the Subcommittee reasonably believed that appellant "possessed information which might be helpful to the subcommittee" (*Wilkinson v. United States*, *supra*, 365 U.S. at 412) and "relevant to the inquiry" (*Oklahoma Press Publishing Co. v. Walling*, *supra*, 327 U.S. at 209). Thus, the Subcommittee could properly subpoena appellant.

IV. RETRIAL DID NOT PREJUDICE APPELLANT'S RIGHT TO A FAIR REBUTTAL.

Appellant argues (Br. 36) that the oral bill of particulars furnished by the Assistant United States Attorney prior to the first trial bound the Government to the position that the only subject under inquiry was that stated in the authorizing resolution, i.e., Communist activity generally. Thus, appellant argues, the Government cannot, at the second trial, proceed on an indictment alleging the lesser, more specific inquiry of Communist activity in news media.

The Court has already held that the evidence introduced at the first trial clearly established that the Subcommittee's investigation was "directed at Communist activity in the press and communications field generally." 280 F.2d at 705. If the Government, at the first trial, was not estopped from entering such evidence and this Court was not prevented from holding that such was a question under inquiry, it is difficult to see how the Government can now be prevented from alleging and proving that subject as a specific subject under inquiry.

And, of course, the Government was not so estopped, and the Court not so prevented at the first trial. At a hearing on defendant's pre-trial motions, government counsel gave an oral bill of particulars in response to an oral motion, in which he stated, regarding the subject under inquiry, that the inquiry was being conducted pursuant to the Senate resolution authorizing the Subcommittee and for the purposes contained in that resolution (R. 19-20). The resolution authorized investigation of Communist activities generally. Considering the oral bill of particulars in context, it is apparent that this reply by the Assistant United States Attorney was not intended to preclude the government from introducing evidence that the subject under inquiry was the more specific subject of Communist infiltration of the press. The latter subject is merely one portion of the broader subject of Communist activities in general, which the

resolution authorizes the Subcommittee to investigate. When the Subcommittee is investigating the narrower problem of Communist infiltration of the press, it is simultaneously investigating the broader subject which it is authorized to investigate. The introduction of evidence on the narrower problem was therefore consistent with the statement of the Assistant United States Attorney that the subject under investigation was the full scope of the Subcommittee's authority.

While the Assistant United States Attorney did state that there was no "smaller, more limited inquiry being conducted" (R. 20), he apparently meant that the Subcommittee was not restricted to showing any inquiry less than the full authorizing resolution. In fact, he specifically said that his remarks as to the exact subject under inquiry should not be taken to limit the scope of the government's proof at the subsequent trial (R. 17):

That [the subject under inquiry] is a matter of fact that will come out at the trial and the proof. [Appellant] is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

Again indicating that he was not limiting the Subcommittee's general power to investigate Communism wherever found, the Assistant United States Attorney stated (R. 17):

Let us assume that the particular inquiry at the moment might have been subversive activities in the field of education. That does not limit and does not restrict the full authority that was granted to this committee by the resolution and, therefore, the committee, through this subcommittee, could make all inquiries that were authorized by it to make.

From these statements it is apparent that the government was not denying that the Subcommittee was conduct-

ing a particularized inquiry. While resisting a specification of the subject under inquiry because the indictment was "sufficient, without further particularization, to inform the defendant of the charge that he must meet and to protect him from a second prosecution" (R. 18), the Assistant United States Attorney was at the same time insisting that the Subcommittee was entitled to pursue the full extent of the powers provided by the Senate. Thus, his statement at the trial did not preclude the government from introducing evidence that the more specific subject under inquiry when appellant was questioned was Communist infiltration of the press.

Even if we assume, *arguendo*, that the Assistant United States Attorney intended to restrict the government's proof of the subject under inquiry to Communist activities in general, this still did not preclude the government from offering evidence at the first trial that the particular subject under inquiry at appellant's hearing was Communist activities in the area of the press. While a variance between an indictment and the proof introduced is fatal if it related to a matter of substance (see *Stirone v. United States*, 361 U.S. 212), the variance between a bill of particulars and the proof is fatal only if the defendant has been prejudiced. *United States v. Albanese*, 224 F.2d 879 (C.A. 2); *United States v. Costello*, 221 F.2d 668, 675 (C.A. 2), affirmed, 350 U.S. 359; *Neal v. United States*, 87 U.S. App. D.C. 377, 185 F.2d 441 (C.A.D.C.), certiorari denied, 340 U.S. 937; *Shayne v. United States*, 255 F.2d 739, 743-744 (C.A. 9), certiorari denied, 358 U.S. 823; *McKenna v. United States*, 232 F.2d 431, 436-437 (C.A. 8).

This difference between the cases where the variance involves an indictment or a bill of particulars reflects their significantly different functions. The Fifth Amendment guarantees that a person charged with a felony be indicted by a grand jury and that the indictment contain the essential elements of the crime. If the government offers proof at trial inconsistent with one of the essential elements charged, it cannot be assumed that the grand

jury would have been willing to return an indictment with a charge conforming to the proof actually introduced. Thus, in such circumstances the government is in effect attempting to convict the defendant of a crime for which he was not indicted. See *Stirone v. United States, supra*, 361 U.S. at 217.

On the other hand, a bill of particulars is simply designed to give the defendant sufficient details of the charges against him so that he can adequately prepare his defense and not be surprised by the evidence offered by the prosecution. *Dunlop v. United States*, 165 U.S. 486, 490-491; *Braden v. United States*, 272 F.2d 653, 662 (C.A. 5), affirmed 364 U.S. 431; *McMullen v. United States*, U.S. App. D.C. , 96 F.2d 574, 579 (C.A. D.C.). Since the prosecution and not a quasi-judicial body like the grand jury provides the bill of particulars, the government is entitled to amend its bill of particulars at any time so long as the defense is not surprised or otherwise prejudiced by the amendment and subsequent variance between the government's proof and the original bill. Rule 7(f), Federal Rules of Criminal Procedure; *United States v. Bender*, 218 F.2d 869, 874 (C.A. 7). Although the government at the first trial did not go through the technicality of amending the bill of particulars, if the government's proof was inconsistent with the bill, "the effect of what it did was the same" (*Stirone v. United States, supra*, 361 U.S. at 217); thus, just as if the bill of particulars had been formally amended, there can be no complaint unless the variance between the government's proof and the bill surprised the defendant and thereby unfairly prejudiced his defense.

Appellant did not claim that at his first trial his defense was surprised or otherwise prejudiced by any variance between the government's oral bill of particulars and the proof it offered at the first trial. If appellant was prejudiced, this fact was of course apparent to him when the government introduced the evidence of the specific subject under inquiry which he claims conflicts with the

bill of particulars. And if this objection had been properly raised at the trial, any prejudice could have been cured by granting appellant a continuance so that he could prepare his defense to the government's evidence. See *United States v. Neff*, 212 F.2d 297 (C.A. 3).

If the Government was thus allowed to "amend" its bill of particulars at the first trial, it must follow that, upon re-indictment, it was permitted to allege the specific subject it had proved at the first trial. We would also observe that, as this Court has held, there could be no substantive contention "that appellant was not aware of the topic and subject under inquiry" (280 F.2d at 706), and it is therefore plain that appellant knew long before even his first trial that the Government would establish that a specific subject under inquiry by the Subcommittee was Communist activity in news media.

Appellant's argument that his defense was, in fact, prejudiced upon re-trial stands on no firmer ground than his argument of estoppel.²³ His first claim of prejudice stems from the death of Senator Hennings prior to the second trial with a resulting inability to produce the Senator's testimony on the issues of the subject under inquiry and the action—or failure of action—on the part of the Subcommittee in authorizing the hearings. Prejudice is also claimed to stem from an alleged present inability of Senator Eastland to recall the details of the Subcommittee's action in authorizing the hearings.

As to the question of the topic under inquiry, the first answer would be that the best evidence on this issue is the several indicia set forth by *Watkins, supra*, discussed

²³ It should be noted that the re-trial was not occasioned by the "deliberate choice for a supposed advantage" criticized by the Court in *Petition of Provo*, 17 F.R.D. 183, affirmed *per curiam*, 350 U.S. 857. The Government in omitting to allege the subject under inquiry in the first trial was merely following the law which, as observed by the Supreme Court by both the majority and dissenting opinions in the decision reversing appellant's first conviction, was the then clear rule in the District of Columbia. *Russell v. United States*, 369 U.S. 749, 754 at Note 4, 782 at Note 2.

above, pages 22 to 26.²⁴ Since, as we have shown, *supra*, pages 22 to 26, and as this Court has held, these sources, including statements of Senator Hennings himself, "spelled out with utmost clarity" (280 F.2d at 705), the subject under inquiry, whatever would have been Senator Hennings' testimony at this trial, such oral testimony would not overcome the conclusive documentary proof. Moreover, the record of the hearings can only lead to the conclusion that Senator Hennings' testimony would not have been inconsistent with that proof. At the outset of the public hearings in New York, the Senator stated: "At the request of the Committee, I went to New York and presided for two days over the executive hearings . . . on the same subject matter" (emphasis added). He then described the subject matter as follows:

"[T]he Committee is interested in the extent and nature of so-called Communist infiltration if such exists in the many news dispensing agencies." (Hearings, Part 17, Gov't Ex. 8, page 1588).

Just prior to appellant's appearance on the stand, Senator Hennings gave further evidence of his understanding of the subject under inquiry by stating that no one would quarrel with the Subcommittee's right to inquire into Communist infiltration of "newspapers or other media of communication." (Hearings, Part 17, Gov't Ex. 8, page 1718). If Senator Hennings had testified, his testimony, in the face of these statements, could only have bolstered the Government's already convincing evidence.

The evidence on the issue of the Subcommittee's action in authorizing the hearings is also clear. As just noted, Senator Hennings himself stated that the executive hear-

²⁴ The Government stipulated that no oral testimony would be offered on this subject (J.A. 11). Appellant conceded that oral testimony on this issue of whether or not he had been advised of the subject under inquiry would be inappropriate (J.A. 11). It must follow that the best evidence of what that subject was at the time of appellant's appearance is the documentary evidence offered by the Government.

ings at which appellant appeared were conducted "at the request of the committee" (*id.* at 1588). The testimony of Senator Eastland concerning the Subcommittee's authorizing of the public hearings was clear and convincing. See J.A. 185, 188-191, 193-194. In contrast, appellant asks too much of the statement of Senator Hennings that: "The Committee has not met to determine whether one policy or another is to be pursued in the course of these hearings." *Id.* at 1588. When this statement is read in the context of the Senator's prior statements that the executive hearings on the same subject were at the request of the Committee and his explanation of the interest of the Subcommittee, it appears that Senator Hennings was not complaining that the hearings had not been authorized, but that he was concerned with an entirely different problem—ensuring that it was clear that the subcommittee was investigating, not the press itself, but Communist "infiltration of the press and similar communications media," and the Chairman agreed that this was the case. Moreover, whatever the thrust of his statement, it is immaterial. As discussed below, seven of the nine members of the Subcommittee were present at the opening of the hearings. Their participation, without objection, did not only conclusively indicate that there had been prior approval of the hearings—particularly in view of Senator Eastland's testimony (J.A. 192-193) that the Subcommittee members, and especially Senator McClellan, who was present at the opening of the public hearings (Hearings, *supra*, Gov't Ex. 8, pg. 1587), would object to calling hearings without the approval of the Subcommittee—but also, such participation would satisfy any requirement of Subcommittee approval of the hearings. And, of course, whatever the subject under inquiry, the issue of the Subcommittee's authorization would be present and, thus, could have been fully explored at the first trial when both Senator Hennings and Senator Eastland were available to testify.

But, an extended discussion of these considerations is not necessary. Appellant's claim of prejudice must rest on the premise that Senator Hennings and Senator Eastland are the only witnesses available to testify as to these matters. Such is patently not the case. There were seven other members of the Subcommittee, five of whom were present at the opening of the public hearings, and there is no claim that these other members were not available to testify as to the subject under inquiry and the actions of the Subcommittee in authorizing the hearings in question. The availability of these witnesses would certainly negate any possible prejudice which could stem from the unavailability of Senator Hennings, whose statements at the time of the hearings are demonstrably consistent with the Government's proof, or which could stem from the alleged deficiency of Senator Eastland's testimony. Thus, the appellant was not prevented from offering a fair rebuttal upon re-trial.²⁵

²⁵ Appellant also contends, on similar theory, that his reindictment was not within the terms of 18 U.S.C. 3288, which allows a certain time for the return of a new indictment where the statute of limitations on the offense had expired before the prior indictment was found defective. The government exceeded the bounds of Section 3288, he claims, when it charged a new and different crime in the second indictment. Appellant seems to feel that because the second indictment specified a subject of inquiry while the first specified none, a different crime was alleged the second time.

This contention is without merit. Appellant was both times indicted under the same statute and for the same conduct: the same Subcommittee hearings on the same date at the same place; the same questions refused of answer. The allegation of a subject of inquiry endows the second indictment with greater specificity: it does not charge a different offense, especially since the subject charged was the one proved on trial of the first indictment.

The indicia for determining whether the possibility of future jeopardy by indictment for the same offense is precluded by the specificity of the indictment at bar, are clearly the indicia to be applied in determining whether two indictments plead the same offense. These indicia were discussed in *Russell v. United States*, 369 U.S. 764, where the Supreme Court examined the contempt of Congress indictments against appellant and others, from the standpoint of sufficiency. The indictments failed, the Court held, not because they were insufficient to show jeopardy, but because they were insufficient to apprise the defendant of what subject under

V. REVERSAL IS NOT REQUIRED BY VIOLATIONS OF SENATE AND SUBCOMMITTEE RULES

Appellant finally contends (Br. 55-60) that his conviction must be reversed on the authority of *Yellin v. United States*, 374 U.S. 109, because of alleged violations of the Senate and Committee Rules. But *Yellin* is not applicable to the case at bar. The record establishes that, contrary to appellant's assertions, the rules in question were not violated, and, even assuming *arguendo* that such violations as alleged by appellant occurred, a reversal would not be required.²⁶

inquiry he must be prepared to meet at trial. Concerning the jeopardy aspect of the first indictments, Mr. Justice Stewart wrote for the majority:

Since the indictments set out not only the times and places of the hearings at which the petitioners refused to testify, but also specified the precise questions which they then and there refused to answer, it can hardly be doubted that the petitioners would be fully protected from again being put in jeopardy for the same offense, particularly when it is remembered that they could rely upon other parts of the present record in the event that future proceedings should be taken against them (*id.* at 764)

It can be said, then, that since the second indictment here, if the first had not been dismissed, would have placed appellant in double jeopardy under the criteria adopted by the Court, the second indictment charges the same offense as the first.

Decisions under the predecessor statute to 18 U.S.C. 3288 reveal the general criteria for determining claims such as appellant's. In *United States v. Main*, 28 F. Supp. 550 (S.D. Tex., 1939), a district court upheld a second indictment, stating that the statute never contemplated a review of the proceedings under the previous record (*e.g.*, what subject under inquiry was proven) other than to satisfy the court that the defendants named in the succeeding indictment were the same persons listed in the prior indictment and that the offenses or transactions, upon which both indictments were based, were the same. See also *Hughes v. United States*, 114 F.2d 285 (C.A. 6, 1940); *United States v. Hoffa*, 196 F. Supp. 25 (S.D. Fla., 1961).

²⁶ Appellant also notes for the Court's consideration a contention that the Subcommittee's authorization by the Judiciary Committee was not proved at the first trial. This claim is not available to appellant since he failed to raise such a contention before the Subcommittee. As discussed, *supra*, page 33, a witness be-

(A) *Yellin v. United States*, 374 U.S. 109, Is Not Controlling

In *Yellin*, *supra*, the Supreme Court held that a witness before the House Committee on Un-American Ac-

fore a Congressional committee can not raise at his trial procedural issues on which he did not rely at the time he refused to answer the questions. See, *United States v. Bryan*, 339 U.S. 323, 330-35; *Emspak v. United States*, 91 U.S.App.D.C. 378, 203 F.2d 26, 54, 56, reversed on other grounds, 354 U.S. 190. The issue whether the Judiciary Committee properly delegated the powers conferred on it by the Senate involves the internal procedures of the Judiciary Committee, and the alleged defect could easily have been remedied (assuming appellant's contention was correct that the Judiciary Committee had not already authorized the Subcommittee) by having the Judiciary Committee vote an authorizing resolution.

In any event, appellant's contention is clearly without substance. Gov't Ex. 3, an excerpt from the official minutes of the meeting of the Judiciary Committee on January 20, 1955, states that the Committee adopted the following resolution:

Resolved, by the Committee on the Judiciary that the Special Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws under S. Res. 366 (81st Cong.) be continued as a Special Subcommittee of the Committee on the Judiciary during the 84th Congress and that the Committee report an appropriate original resolution favorably to the Senate for this purpose.

The minutes of another meeting of the Judiciary Committee on February 7, 1955, show that the Chairman appointed nine members of that Committee to the Subcommittee (Gov't Ex. 4). And on March 18, 1955, the Senate passed Senate Resolution 58, 84th Cong., 1st Sess. authorizing the continuance of the Subcommittee (Gov't Ex. 2a). While the resolution of the Judiciary Committee to continue the Subcommittee preceded the Senate's authorizing resolution, it is plain that the Judiciary Committee authorized the Subcommittee to act during the 84th Congress. Moreover, these exhibits and the report of the Committee of the Judiciary, S. Res. 174 (Gov't Ex. 6), consisting of a recital of the activities of the Subcommittee on Internal Security; Gov't. Ex. 10, the Senate Resolution certifying appellant's contempt for failure to answer questions before the Subcommittee, S. Res. 253; and the Judiciary Committee Report accompanying that Resolution, established that the Subcommittee's actions had the approval and sanction of the Judiciary Committee. This being so, the actions of the Subcommittee must be presumed to be within the scope of authority conferred by the parent committee. *Norris v. United States*, 257 U.S. 77, 82, and see the testimony of Senator Eastland at J.A. 226 that the Subcommittee was authorized by the Judiciary Committee.

tivities was entitled to the protection of, in the words of appellant, "rights guaranteed by the Rules of the Committee themselves" (Br. 55). At the outset, however, the Court was faced with the Government's contention that the House Committee Rules were written to provide guidance for the Committee alone and not designed to confer rights upon witnesses. In answer, the Court reviewed the Committee Rules and took care to point out that both the structure of those rules and the Committee practice indicated that they were in fact formulated for the protection of the witnesses appearing before the Committee. The Court, therefore, held that the petitioner was entitled to exercise the rights thus granted.

In contrast to the House Committee Rules before the Supreme Court in *Yellin*, however, the Rules of the Internal Security Subcommittee do not concern themselves with the rights and privileges of witnesses, but rather are concerned with the internal functions of the Subcommittee and are rules formulated for the guidance of its members. These rules are set forth in their entirety as Appendix 1 to our brief, *supra*, pp. 67-69. It is submitted that a reading of these rules will show that of the twelve, only two, Rules 7 and 8, can be reasonably construed to grant any rights to witnesses. But even these primarily govern the Subcommittee. Rule 7, in respect to filing of statements, does not grant a right, but sets forth the conditions under which the Subcommittee will accept written statements. Rule 8, though granting access to transcripts, also specifies that the Subcommittee shall maintain transcripts, and shall permit access only under supervision and copies only at the witnesses' expense. Clearly the "rights" of witnesses created or granted by these rules are not sufficient to overcome the overall structure of the Subcommittee's Rules so as to permit characterization of these rules as working for the witness' benefit. Nor does the appellant show any practice of the Subcommittee which could change these rules of internal direction into rights created for the benefit of witnesses.

Nor can the Senate Rules be held to have been passed for the protection of witnesses. S. Res. 366, in granting the Judiciary Committee or its authorized Subcommittee the subpoena power, merely reflects the provisions of the Legislative Reorganization Act of 1946, Section 134(a), 2 U.S.C. 190(b).²⁷ It is a truism to state that such rules were intended to relate only to the internal management of the Senate.

Since neither the Senate nor the Committee rules applicable in this case can be considered as granting rights to the appellant, the premise of the Supreme Court decision in *Yellin* is not here present and that decision is not controlling.

(B) Neither The Senate Nor The Subcommittee Rules Were Violated.

Even if we assume that the Senate and/or the Subcommittee's rules did grant rights to witnesses, and that *Yellin, supra*, would be otherwise applicable, it is not dispositive of the issues here for the simple reason that the rules were not violated.

²⁷ Sec. 134(a) provides: "Each standing committee of the Senate, including any subcommittee of any such committee, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Senate, to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to take such testimony and to make such expenditures (not in excess of \$10,000 for each committee during any Congress) as it deems advisable. Each such committee may make investigations into any matter within its jurisdiction, may report such hearings as may be had by it, and may employ stenographic assistance at a cost not exceeding 25 cents per hundred words. The expenses of the committee shall be paid from the contingent fund of the Senate upon vouchers approved by the chairman. 2 U.S.C. 190(b).

1. *Approval of the hearings.*²³

Both the executive and open hearings in question were approved by the Subcommittee. As we have already observed, Senator Hennings, who conducted the executive Committee hearings with Senator Jenner (J.A. 43), and upon whom appellant relies so heavily, stated that he had conducted the hearings "at the request of the Committee" (Hearings, Part 17, Gov't Ex. 8, p. 1588). The prior approval made implicit by such a "request" was corroborated by the testimony of Senator Eastland (J.A. 188-189).

Again, as we have already noted, Senator Eastland's testimony on the question of advance approval of the public hearings in Washington, D. C. is clear and convincing. For example, he testified (J.A. 189):

"(Q) . . . Can you tell me whether there was a meeting of the Subcommittee to go into the question of investigation of the press?

"(A) Yes sir. I can tell you that at the time it was approved first by the Subcommittee. I do not remember that meeting, but I can remember the meeting that approved in my office the open hearings here in Washington."

And he also stated (J.A. 190):

"I approved in every instance, got the approval in every instance of the full Committee, full Subcommittee of an investigation . . . I can remember very definitely the meeting in my office that authorized the open hearings."

The Senator's testimony is underlined by his explanation of the Subcommittee's policy concerning prior ap-

²³ Though appellant limits his contention to approval of the hearings themselves, we note that the hearings were but part of a "major investigation" specified in Rule 1 of the Subcommittee's rules. For the purposes of this case, however, we agree with appellant's apparent belief that the distinction is immaterial. If, as we will show, the hearings were authorized by the Subcommittee, it must follow that the investigation of which they were a part was similarly approved.

proval and his compliance with that policy. For example, he testified (J.A. 191):

"My policy was, in every instance, to get the permission of the full committee and I had to because we had members of the Subcommittee who would object to meetings, to hearings, unless we had received their approval."

And he stated (J.A. 194):

"Now I can remember that when I became Chairman of the Internal Security Committee that because of the pressure on me, I had to scrupulously follow that rule of getting prior authority, and I did not call on the staff to do it, I did it myself."

See also J.A. 190-192, and 193.²⁹

Nor is the Senator's testimony seriously contradicted. Counsel Sourwine's testimony (J.A. 105, 107) that he received the Chairman's oral approval for the hearings is not inconsistent with the Chairman's statement that he scrupulously followed the "rule of getting prior authority, and I did not call on the staff to do it, I did it myself" (J.A. 194). Sourwine did testify that there was no meeting "setting the question under inquiry of January 6" (J.A. 107), but certainly he was only testifying as to his own knowledge and, as Senator Eastland testified, it would not be unusual that Subcommittee action was taken and the details would not be known to Sourwine (J.A. 190-191). We have already discussed Senator Hennings' statement (*supra*, p. 56) and will only observe that the fact that the Subcommittee had not decided on whether or not certain policy would be followed at the hearings does not mean that they had not meant to approve the

²⁹ Senator Eastland's testimony on this point is particularly compelling. The Senator observed that "... Senator McClellan was a moving spirit in getting the full committee to authorize an investigation because of the experience he had had on the McCarthy Committee." (J.A. 193). As already noted, Senator McClellan was present at the opening of the public hearings in Washington, and participated without objection (Hearings, Part 17, Gov't Ex. 8, p. 1587, *et. seq.*)

hearings themselves—particularly when the preceding executive committee hearings were so approved. And, query, how would the Senator know the objection made of the hearings—("I . . . presided . . . over executive hearings . . . on the same subject matter", Hearings, Part 17, p. 1588)—if there had not been prior discussion.

But, in any event, even if we assume, contrary to Senator Eastland's testimony, that the Subcommittee had not met prior to the opening of the hearings in Washington, the Senate Rules and Rule 1 of the Subcommittee were not violated. Seven of the nine Subcommittee members were present at the opening of the Washington hearings, and these members, including Senator McClellan, participated in the hearings without objection. Such participation by almost the full Subcommittee not only indicates that there had been prior authority, but would, in any case, constitute compliance with the rules. *United States v. Miller*, 152 F. Supp. 781, reversed on other grounds, 104 U.S. App. D.C. 30, 259 F.2d 187.

(2) *The Issuance Of The Subpoenas.*

Appellant contends that the issuance of the subpoenas on the basis of information provided by the Subcommittee counsel³⁰ was in violation of the Senate Rules, and rests on his assertion that the authorizing resolution, S. Res. 366, must be interpreted as requiring Subcommittee approval of each particular subpoena. But, the resolution should not be so interpreted.

As noted, the language of the authorizing resolution is a reflection of section 134(a) of the Legislative Reorganization Act of 1946, 2 U.S.C. 190(b), granting subpoena power to standing Senate committees and their au-

³⁰ Senator Eastland testified, "I do remember this about it: that Sourwine talked to me about information that he had, what witnesses would testify, and we took it up" (J.A. 188), and "we discussed what information he had, and it was up to me to determine whether to subpoena them or not, and that is what I did" (J.A. 200).

thorized subcommittees. To accept appellant's interpretation of S. Res. 366, then, would be to hold that the Senate has imposed on each one of its standing committees the rule that subpoenas can only be issued with the approval of a majority of the subcommittee. Such a restrictive interpretation need not be made of section 134(a)—a section which, on its face, is designed to grant power to Senate committees and, at the same time, to provide reasonable discretion to the committees themselves in the use of the granted powers, rather than to specify the procedure to be followed.³¹ The Senate committee itself has so construed the granted authority, and a different construction should not be imposed without clear and compelling reasons for doing so. *United States v. Smith*, 286 U.S. 6, 48; *Christoffel v. United States*, 338 U.S. 84. The Subcommittee has provided that the authority thus granted may be exercised by the Chairman, Rules of Procedure, No. 2, *supra*, p. 67. Also, the Subcommittee has provided for delegation of the subpoena power, Rule 2, and for the use of task forces in "particular fields" or for "particular assignments," Rule 3, *supra*, p. 67. Certainly, these rules do not anticipate that such task forces, in carrying out their assigned duties, would have to submit their decision on necessary witnesses to the full Subcommittee for ratification. Such considerations not only indicate the interpretation of the subpoena power made by this Senate Committee, but point up the restrictions on each standing committee that would be imposed by appellant's construction.

Moreover, once again, the fact that almost the entire subcommittee sat at the opening of the hearings in Washington, and a majority of the Subcommittee on the day of appellant's appearance (Hearings, Gov't Ex. 8, p. 1587, 1717), would satisfy any need for Subcommittee authorization of the subpoenas. Even though the Subcommittee

³¹ We note that Section 133(a) of the Legislative Reorganization Act, 2 U.S.C. 190(a), was entitled "Committee Procedure," 66 Stat. 831, and is directory in nature, and that Section 134, 2 U.S.C. 190(b), was entitled "Committee Powers," 60 Stat. 831-832.

did not approve each subpoena beforehand, the ratification of the Chairman's action in issuing the subpoenas, by the members' participation in the hearings at which the witnesses were required to testify, would constitute substantial compliance with the power "to require by subpoenas or otherwise the attendance of such witnesses . . . as [the Subcommittee] deems advisable." S. Res. 366, Section 2. If appellant was entitled to a determination by a majority of the Subcommittee that his appearance on a particular day before the Subcommittee was "advisable", such a determination was made by the members of the Subcommittee who conducted the hearings and who comprised a majority of the Subcommittee.

CONCLUSION

For the reasons set forth above, we respectfully submit that the judgment of the District Court should be affirmed.

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APPENDIX I

**Rules of Procedure, Internal Security
Subcommittee of the Senate
Committee on the Judiciary**

**RESOLUTIONS AND RULES
ADOPTED BY THE
INTERNAL SECURITY SUBCOMMITTEE
OF THE
COMMITTEE ON THE JUDICIARY
OF THE
UNITED STATES SENATE
AT ITS MEETING
FEBRUARY 7, 1955**

* * * *

Rules for Procedures

1. No major investigation shall be initiated without approval of a majority of the subcommittee. However, preliminary inquiries may be initiated by the subcommittee staff with the approval of the chairman of the subcommittee.

2. Subpenas for attendance of witnesses and the production of memoranda, documents, and records shall be issued by the subcommittee chairman or by any other member of the subcommittee designated by him.

3. Task forces of the subcommittee shall be designated by the chairman, from time to time, to operate in particular fields or for the purpose of performing particular assignments. Task forces shall not meet without the approval of the chairman, nor undertake any activities not assigned by the chairman, or without his approval.

4. Should a majority of the membership of the subcommittee request the chairman, in writing, to call a meeting of the subcommittee, then in the event the chairman should fail, neglect, or refuse to call such meeting within 5 days thereafter, such majority of the subcommittee may call such meeting by filing a written notice thereof with the chief counsel of the subcommittee, who shall promptly notify, in writing, each member of the subcommittee.

5. Pursuant to subsection (3) of rule XXV, as amended, of the Standing Rules of the Senate (S. Res. 180, 81st Cong., 2d sess., agreed to February 1, 1950) and the resolution of the Judiciary Committee thereunder, approved January 20, 1955, a quorum of the subcommittee for the purpose of taking sworn testimony shall consist of not less than two Senators of such subcommittee, except when the subcommittee, in its judgment, two-thirds of the subcommittee members concurring, may authorize a quorum of one Senator of such subcommittee for the purpose of taking such testimony.

6. All witnesses at public or executive hearings who testify to matters of fact shall be sworn.

7. Any witness desiring to read a prepared or written statement in executive or public hearings shall file a copy of such statement with the counsel or chairman of the subcommittee 24 hours in advance of the hearings at which the statement is to be presented. The subcommittee shall determine whether such statement may be read or placed in the record of the hearing.

8. An accurate stenographic record shall be kept of the testimony of all witnesses in executive and public hearings. The record of his own testimony, whether in public or executive session, shall be made available for inspection by witness or his counsel under committee supervision; a copy of any testimony given in public session or given by the witness in executive session and subsequently quoted or made part of the record in a public session, shall be made available to any witness, at his expense, if he so requests.

9. Interrogation of witnesses at subcommittee hearings shall be conducted on behalf of the subcommittee by members and authorized staff personnel only.

10. All testimony taken in executive session shall be kept secret and shall not be released for public information without the approval of a majority of the subcommittee.

11. No report of the subcommittee shall be made to the Senate without a majority vote of the full committee, nor released to the public without the authority of a majority of the subcommittee.

12. All staff members shall be confirmed by a majority of the subcommittee. The compensation of staff members shall be fixed by the chairman, who shall also have authority to dismiss any member of the staff.